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Jensen Shawa Solomon Duguid Hawkes LLP is pleased to provide summaries of recent Court Decisions which consider the Alberta Rules of Court. Our website, www.jssbarristers.ca, also features a Cumulative Summary of Court Decisions which consider the Alberta Rules of Court. The Cumulative Summary is organized by the Rule considered.

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MOUSSI V TD HOME AND AUTO INSURANCE COMPANY, 2019 ABQB 242 (MASTER BIRKETT)
Rules 1.2 (Purpose and Intention of These Rules) and 7.1 (Application to Resolve Particular Questions or Issues)

The Plaintiff, a minor who had suffered injuries in an automobile accident, had filed a claim for coverage in regards to an injury to his jaw. The Defendant insurer wanted the Plaintiff to attend an independent medical examination by a dentist of the insurer's choosing. The Plaintiff objected on the basis that a dentist was not a "qualified medical practitioner" as contemplated by the insurance policy.

The Application was brought by the Plaintiff pursuant to Rule 7.1(2) to decide on a question of law as to whether the Defendant insurer was entitled to an "independent dental examination."

The Court began by confirming that Rule 7.1 must be interpreted in light of the purpose and intention of the Rules as stated in Rule 1.2, namely to resolve disputes in a timely and cost-effective way. Moreover, Master Birkett referred to jurisprudence confirming that the burden is on the Applicant in a Rule 7.1 Application to prove on a balance of probabilities that the issue should be determined in their favour. Furthermore, a determination of the issue by the Court invokes *res judicata* such that the issue cannot be reopened or re-litigated at Trial.

Master Birkett summarized the relevant case law and reiterated that there is a degree of cooperation expected between an insurer and an insured. In that vein, when an insurer requires an insured to be examined by a medical professional, and there is a good faith basis for this requirement, the insured must comply. The Plaintiff was required to submit for an examination by the dentist.

KANG V MB, 2019 ABQB 246 (MANDZIUK J)
Rules 1.2 (Purpose and Intention of These Rules), 3.62 (Amending Pleadings), 3.65 (Permission of Court to Amendment before Close of Pleadings), 3.67 (Close of Pleadings), 3.68 (Court Options to Deal with Significant Deficiencies) and 5.33 (Confidentiality and Use of Information)

The Plaintiff, Kang, made several Applications to the Case Management Justice including an Application to amend his Statement of Claim and an Application to engage the Information and Privacy Commissioner of Alberta (the "Privacy Commissioner"). Further, some of the Defendants had applied to strike Kang's claims against one of the Defendants, Fraser.

The Action stemmed from Kang having been expelled from the University of Alberta (the "University") and subsequently criminally charged with sexual assault. The charges were later withdrawn and the expulsion overturned. Kang filed the Action against various individuals connected to the University (collectively, the "University Defendants"). Kang also sued several members of the Edmonton Police Service (collectively, the "EPS Defendants").

The Court first addressed Kang's proposed amendments to his Statement of Claim. Mandziuk J. identified the Rules governing amendments to pleadings: Rule 3.62, which allows a party to amend a pleading without the Court's permission before the close of pleadings, and Rule 3.65, which allows a party to amend pleadings after the close of pleadings with the Court's permission. This Application was made pursuant to Rule 3.65. Mandziuk J. then stated the four exceptions to the general rule that a party may amend pleadings at any time. Amendments should not be granted when: 1) the amendment would cause serious prejudice to the opposing party not compensable in Costs; 2) the amendment requested is "hopeless"; 3) unless permitted by statute, the amendment seeks to add a new party or a new cause of action after the expiry of a limitation period; and 4) there is an element of bad faith associated with the failure to plead the amendment in the first instance.

The Court also noted that pleadings close when a Reply to a Statement of Defence is filed or the time for filing a Reply to a Statement of Defence expires, whichever is earlier pursuant to Rule 3.67. Mandziuk J. did not find that any of the four exceptions applied in this case.

The Court then considered an Application by the University Defendants to strike the claims against the Defendant, Fraser, pursuant to Rule 3.68 which the Court confirmed must be read in light of the timeliness and efficiency desired under Rule 1.2. The Application was granted by Mandziuk J. There was no reasonable claim against Fraser personally as any liability would belong to the University.

Finally, the Court addressed Kang's Application to have the Privacy Commissioner review the University's collection, use, and disclosure of his personal information. The University Defendants objected on the basis that information disclosed through their Affidavits of Records was subject to the implied undertaking codified by Rule 5.33. The Court ruled that the circumstances were exceptional enough to grant relief from the implied undertaking rule. The same parties and similar issues would be involved in any process conducted by the Privacy Commissioner so there was little chance of prejudice being suffered. Moreover, if the University Defendants did breach Kang's privacy rights, they would not be shielded by the implied undertaking rule.

Kang's Applications to amend his pleadings and to engage the Privacy Commissioner were granted, as was the University Defendants' Application to strike Kang's claims against the individual Defendant, Fraser.

LEGREELEY V SCHMIDT, 2019 ABQB 263 (GRAESSER J)
Rules 1.2 (Purpose and Intention of These Rules) and 1.3 (General Authority of the Court to Provide Remedies)

The parties had previously been in a common law relationship lasting over three years. Upon sale of a house jointly owned by them, the parties asked the Court to determine the division of the sale proceeds, having regard to the co-mingling of their assets generally. The Application was brought under the *Judicature Act*, RSA 2000 c J-2, and the *Law of Property Act*, RSA 2000 c L-7, though

argument focussed on the division of an interest in land pursuant to section 15 of the *Law of Property Act*, as well as the authority in section 17 to order an accounting and compensation with respect to land.

The Court noted that the parties had not claimed unjust enrichment or a resulting trust, and that the *Law of Property Act* did not provide broad jurisdiction to resolve financial issues arising out of cohabitation and separation. However, the Court found that the parties had, implicitly if not expressly, consented to the Court's jurisdiction to do so. Referring to the purpose of the Rules as set out in Rule 1.2, and the broad remedial jurisdiction set out in Rule 1.3, Justice Graesser held that "[t]he foundational rules encourage the parties to find an effective and expedient way of resolving their disputes."

The Court proceeded to evaluate the parties' financial records and decide their respective entitlements and obligations with respect to various assets and liabilities.

IOANNIDES V KAMDAR, 2019 ABQB 265 (MASTER SCHLOSSER)
Rules 1.2 (Purpose and Intention of These Rules) and 4.33 (Dismissal for Long Delay)

The Defendant applied to dismiss the Action for long delay under Rule 4.33, asserting more than three years had elapsed without a significant advance in the Action. The Plaintiff contended that answers to Undertakings provided by the Plaintiff significantly advanced the Action within the three year period at issue. The answers to Undertakings consisted of confirmation that certain documents were unavailable and the provision of "will-say statements" by certain prospective witnesses.

Master Schlosser noted that the provision of will say statements "is to be encouraged" taking into account both Rule 1.2 and the fact that resolution is most likely when the parties know the case to meet.

Master Schlosser found however, that applying the functional approach to the answers to Undertakings revealed that the will-say statements did not address the matters raised in the lawsuit as they were directed at the character of one of the Defendants. Master Schlosser pointed out that if the statements were admissible at all, they would only be admissible as similar-fact evidence, and of marginal probative value.

Having found that more than three years had elapsed without a significant advance in the Action, Master Schlosser granted the Application, and dismissed the Action.

UNRAU V NATIONAL DENTAL EXAMINING BOARD, 2019 ABQB 283 (ROOKE ACJ)
Rules 1.2 (Purpose and Intention of These Rules), 1.4 (Procedural Orders), 2.22 (Self-Represented Litigants), 2.23 (Assistance Before the Court), 3.68 (Court Options to Deal with Significant Deficiencies), 5.3 (Modification or Waiver of this Part), 5.12 (Penalty for not Serving Affidavit of Records), 5.19 (Limit or Cancellation of Questioning), 6.9 (How the Court Considers Applications), 7.2 (Application for Judgment), 7.3 (Summary Judgment), 9.4 (Signing Judgments and Orders), 10.29 (General Rule for Payment of Litigation Costs), 10.33 (Court Considerations in Making Costs Award), 10.49 (Penalty for Contravening Rules), 14.5 (Appeals Only with Permission), 14.74 (Application to Dismiss an Appeal) and 14.92 (Authority of the Registrar)

After the Plaintiff filed a Statement of Claim which made bald allegations without specifically referencing any of the eleven named Defendants, the Court initiated a Rule 3.68 "show cause" procedure under Practice Note 7, which required the Plaintiff to provide a basis for the Action. The Plaintiff did not reply, and his Statement of Claim was struck. This Decision considered whether the Plaintiff should be declared a vexatious litigant and subject to Court access restrictions. Rooke A.C.J. took the opportunity to review the way that Courts deal with abusive litigants.

Rooke A.C.J. explained that the Rule 3.68 "show cause" procedure is a new method used by the Court to evaluate potentially abusive Court filings. It was initially used to divert seemingly abusive *habeas corpus* Applications, but through Civil Practice Note No. 7, it now generally applies to "hopeless and abusive civil proceedings". His Lordship

also explained that the Court's approach to abusive litigation has shifted, and its gatekeeping functions should be applied prospectively, rather than reactively. Rooke A.C.J. also explained that Judges are obliged to facilitate the process, and in fact, Rules 1.2(1) and (2) direct that function should "trump pure formality". However, this does not mean that self-represented litigants may skirt the rules of procedure. Rather, the management of abusive claims is a critical part of the "culture shift" created by the new Rules.

His Lordship next emphasized that "frivolous", "vexatious", and "abusive" litigation is already recognized as requiring Court intervention through Rules 1.4(2)(b), 3.68, 5.3, 5.19, 14.74, and 14.92. However, in many senses, these definitions overlap. As such, Rooke A.C.J. commented that the terms "vexatious" and "frivolous" can be misleading, and should be avoided. The focus should be on the *effect* of the litigation as abusive, not the intentions of the litigant. Rooke A.C.J. then reviewed the connection between abusive litigation and mental health, and noted that early intervention is likely "the best opportunity to assist abusive litigants with psychiatric issues". As such, proportionate steps should be imposed when signs of abuse first appear.

Next, Rooke A.C.J. categorized various "types" of abusive litigants, and reviewed typical abusive conduct such as "procedural nitpicking", which may include the aggressive pursuit of penalties for late-filed Affidavits of Records under Rule 5.12.

Rooke A.C.J. also noted that the term "vexatious litigant" is not defined in the Rules, but it is mentioned in Rule 14.5 with respect to prohibiting or limiting access to Appeals. Given Rule 14.5, the Justice emphasized that one aspect of the definition is clear: a "vexatious litigant" is one that requires "permission to institute or continue proceedings". His Lordship therefore defined the term "vexatious litigant order" functionally, as referring to "an [O]rder that imposes prospective [C]ourt access restrictions on future [C]ourt activity based on anticipated future litigation misconduct". His Lordship defined "vexatious litigant" as "a person subject to a "vexatious litigant order", with no special meaning beyond its functional identification.

Rooke A.C.J. noted that two types of Court access restrictions are available to Judges: procedural Orders which may prohibit parties from taking steps in an Action until certain milestones have been met; and "vexatious litigant" Orders, which may extend to unrelated or future litigation. There are also two sources of authority to impose Court access restrictions: legislation, and the Courts' inherent jurisdiction. His Lordship explained that the Rules complement the Court's inherent jurisdiction, and noted that many Rules simply codify the Court's inherent powers. However, Rooke A.C.J. suggested that inherent jurisdiction is a more flexible, proportionate, and responsive tool to impose access restrictions. His Lordship also described the processes through which it may be determined that restrictions are appropriate, and endorsed a document-only procedure authorized by Rule 6.9(1)(c) for doing so.

Rooke A.C.J. also explained that there is a difference between a "vexatious litigant", and "vexatious litigation". Vexatious litigation concerns whether a claim should be struck pursuant to Rule 3.68, or summarily dismissed as having no merit pursuant to Rules 7.2 and 7.3. In contrast, making a vexatious litigant Order evaluates the individual litigant and his or her past conduct. After reviewing the indicators of abusive litigation, and the factors that Courts should consider in determining whether access restrictions should be imposed, Rooke A.C.J. noted that imposing pre-filing leave requirements may actually shield abusive litigants from having to pay Costs for wrongfully filed materials under Rule 10.29, or from having to pay enhanced Costs pursuant to Rule 10.33. His Lordship also noted that pursuant to Rule 10.49, monetary sanctions may be imposed in response to repeated, unsuccessful leave Applications.

Next, Rooke A.C.J. discussed the contents of Court access restriction Orders. Directions about the mechanism for seeking leave are particularly important to include in vexatious litigant Orders, especially where there is no Appeal, such as for decisions denying permission to initiate or continue the litigation as directed in Rule 14.5(4). His Lordship also emphasized that Court access restriction Orders should prohibit the abusive litigant from preparing Court documents, communicating with the Court on behalf

of another person, or acting as an agent or next friend of another person pursuant to Rules 2.22 and 2.23.

His Lordship then explained that the Court's ability to review defective filings is limited as a result of legislative choice. Rule 14.92 provides a summary process to review defective filings at the Court of Appeal, but no analogous rule exists for the lower Courts. As such, narrower restrictions may be more effective and easier to enforce. That said, through Rule 14.5(j), access restrictions imposed in one Alberta Court are recognized in another, meaning that restrictions imposed by one Court "will inevitably expand to have a global scope at the Alberta Court of Appeal". His Lordship characterized this as a legislative effort to streamline Court processes.

Ultimately, Rooke A.C.J. imposed Court access restrictions on the Plaintiff, and dispensed with the Plaintiff's approval of the Order pursuant to Rule 9.4(2)(c).

SCOTT V CARGILL LIMITED, 2019 ABQB 308 (MASTER ROBERTSON)
Rules 1.2 (Purpose and Intention of These Rules), 4.31 (Application to Deal With Delay) and 13.18 (Types of Affidavit)

This was an Application by the Defendant/Applicant, Cargill Limited ("Cargill") to dismiss what the Court described as an "ancient wrongful dismissal action" pursuant to Rule 4.31. The Action had been commenced in 2004.

Master Robertson applied the factors enumerated in Rule 4.31 to the facts. The Rule requires an examination of whether delay has caused actual "significant prejudice" or whether the delay has been "inordinate and inexcusable" which results in a presumption of significant prejudice.

There was no dispute that the delay in this case was "inordinate" as the matter had still not been resolved after 15 years. Therefore, Master Robertson focussed on whether the delay had caused actual significant prejudice or whether the delay was inexcusable resulting in a presumption of significant prejudice. However, before doing so, Master Robertson also addressed the Plaintiff/Respondent, Scott's, objection to Cargill's Affidavit on the basis that Cargill's affiant did not have personal knowledge of the matters attested to as required for Applications for final relief by Rule 13.18. Master Robertson agreed that the affiant did not have personal knowledge; however, as the Affidavit consisted largely of descriptions of dates for the steps taken in the Action and letters sent between counsel, Master Robertson ruled that there should not be a dispute over evidence of that nature.

With regards to actual significant prejudice, Master Robertson did not find that Cargill had suffered any. There was some evidence missing regarding Scott's mitigation efforts, but she had already admitted on Questioning that her efforts were very modest.

With regards to inexcusable delay, the Court clarified that "inexcusable" must be looked at in context. If the delay is substantially caused by the Defendant, the delay is effectively "excused". In this case, the Defendant's counsel was completely non-responsive to numerous attempts by Plaintiff's counsel to move the matter forward. This ran counter to Rule 1.2 which requires counsel to work cooperatively to advance an Action towards resolution. Therefore, even though some of the delay could be attributed to Scott, the Court did not find that the delay was "inexcusable."

Finally, the Court considered whether it should exercise the Court's discretion under Rule 4.31 to dismiss a claim even where there is no significant prejudice and the delay was not inexcusable. Master Robertson did not use this discretion "in light of the apparent deliberate attempt to delay the plaintiff's claim." The Application was dismissed.

AE V ALBERTA (CHILD WELFARE), 2019 ABQB 401 (HO J)
Rules 1.2 (Purpose and Intention of These Rules), 4.33 (Dismissal for Long Delay) and 6.14 (Appeal from Master's Judgment or Order)

The Plaintiffs in four related Actions collectively sought to restore their Appeal of a Master's Decision which had dismissed the Actions for long delay pursuant to Rule 4.33. The Appeal had been struck for failure to file a Brief within

the timeline mandated by Court of Queen's Bench Civil Practice Note 2 relating to Special Applications.

As no authority was provided for the test to be applied when considering whether to restore an Appeal from a Master pursuant to Rule 6.14, Justice Ho relied on the ample authority available regarding restoration of matters before the Court of Appeal. Specifically, the Court cited with approval the factors fulsomely summarized by Wakeling J.A. in *Warren v Warren*, 2019 ABCA 20: (1) Is there any reason to conclude that the Applicant, at any time after filing the notice of Appeal, did not intend to prosecute the Appeal? (2) Has the Applicant provided an explanation for the deficiency that prompted the Registrar to strike the Appeal? If so, is the explanation consistent with an intention on the part of the Appellant to advance the Appeal? (3) Has the Applicant moved with sufficient expedition to cure the defect, taking into account the nature of the defect? (4) Are there arguable grounds in support of an Appeal? Is the likelihood of success high enough to conclude that it is not a frivolous Appeal? (5) Will the restoration of the Appeal cause the Respondent any prejudice? If so, is it appropriate to require the Respondent to endure this prejudice?

Moreover, it was noted that no single factor is determinative, and that the factors together guide the Court in analyzing whether restoration would be in the interest of justice.

In reviewing the circumstances at hand against these factors, Justice Ho was not convinced that restoration would be in the interest of justice. Of chief importance was the Plaintiffs' limited chance of success in overturning the dismissal for long delay, as well as the Plaintiffs' general pattern of delay contrary to the general expectation of timeliness under Rule 1.2. The Application was dismissed.

FALGUI V SOLOMON COLLEGE LTD, 2019 ABQB 404 (HENDERSON J)
Rules 1.2 (Purpose and Intention of these Rules), 3.68 (Court Options to Deal with Significant Deficiencies) and 13.7 (Pleadings: Other Requirements)

Some but not all of the Defendants in the Action applied to strike all or part of the Plaintiffs' fourth Amended Statement of Claim pursuant to Rule 3.68(2)(b), arguing that it did not disclose a reasonable cause of action. In response, the Plaintiffs submitted a proposed fifth Amended Statement of Claim, in which some claims had been abandoned and others particularized. The Plaintiffs argued that the proposed fifth Amended Statement of Claim disclosed a reasonable cause of action and should not be struck.

Justice Henderson noted that the test for striking pleadings pursuant to Rule 3.68(2)(b) is whether the claim, as pleaded, has a reasonable prospect of success. It will only be struck if it is plain and obvious that the pleading discloses no reasonable cause of action, even when all the facts pleaded are presumed to be true. While facts on a motion to strike are generally presumed to be true, there are some exceptions – for instance, "bare allegations with no supporting facts should not be assumed to be true". His Lordship also explained that the Court should be cognizant of the "culture shift" endorsed by the Supreme Court in *Hryniak v Mauldin*, 2014 SCC 7 which requires Courts to consider a "proportionate timely and affordable remedy" to fairly and efficiently determine the issues between the parties. This is consistent with Rule 1.2(2)(a) and (b), which explains that the Rules are intended to be used to identify the real issues in dispute, and facilitate resolution quickly.

Next, Justice Henderson considered the allegations in the proposed fifth Amended Statement of Claim – which included negligent and fraudulent misrepresentations, the existence and breach of a contract, and circumstances allowing for the corporate veil to be lifted. The Defendants argued that "bald allegations" within it did not provide the particulars required to explain why the corporate veil should be lifted. Justice Henderson noted that allegations of fraud and fraudulent misrepresentation must be pleaded with particularity in accordance with Rule 13.7, but emphasized that the claim should be considered and read as a whole. When that was done, the facts pleaded provided more than "bald allegations". As such, the Application was dismissed.

AARC SOCIETY V CANADIAN BROADCASTING CORPORATION, 2019 ABCA 125 (MCDONALD, WAKELING AND PENTELECHUK JJA)
Rules 1.2 (Purpose and Intention of these Rules), 3.62 (Amending Pleading), 3.65 (Permission of Court to Amendment Before or After Close of Pleadings) and 3.67 (Close of Pleadings)

The Appellant appealed portions of a Chambers Judge's Order denying it permission to amend its defamation claim. The Chambers Judge had determined that the proposed amendment related to a time barred injury, constituted significant prejudice to the Respondents, and should not be permitted. The Appellant appealed, arguing that its amendments were not prejudicial and not time barred, because pursuant to the "single publication rule" of defamation law, a new defamation Action is potentially available each day that defamatory materials remain on a website. The Court of Appeal noted at the outset that this is a "very interesting question and of unusual importance".

First, Wakeling J.A. explained that the Court may authorize a party to amend a pleading after the close of pleadings pursuant to Rules 3.62, 3.65, and 3.67 when it is appropriate to do so. Typically, Courts allow such amendments unless there is a compelling reason not to, such as if allowing the amendment would "contravene the public interest in promoting expeditious and economical dispute resolution", or would "significantly harm a legitimate litigation interest of the non-moving party". This policy ensures that pleadings may be amended to "identify the real issues in dispute", and is therefore consistent with Rule 1.2(a). However, non-moving parties should not have to incur costs responding to amendments that "cannot possibly succeed", such as if they disclose no cause of action, are time barred, or are otherwise hopeless; or amendments that are the "product of bad faith". The onus is on the non-moving party to demonstrate, on a balance of probabilities, that the amendment will significantly harm a legitimate litigation interest or the administration of justice.

Wakeling J.A. held that the Chambers Judge erred in refusing to permit the amendments. His Lordship held that the proposed amendments were not time barred due to the "single publication rule". His Lordship also held that the Chambers Judge had erred in finding that the Appellant's "strategic about-turn, without more, constituted significant litigation prejudice" to the Respondents, and had erred in failing to consider whether a Costs award could compensate for such prejudice.

Pentelechuk J.A. agreed with Wakeling J.A. that the Appeal should be allowed, but declined to "weigh in on whether a defamation arises every day the defamatory material remains on an internet website". Her Ladyship adopted Wakeling J.A.'s comments on the law regarding amendments to pleadings, and noted that even though the Appellant had changed its litigation strategy, it had not significantly prejudiced the Respondents, was driven largely by the Respondents' consolidation of five underlying Actions, and their decision to raise the subject of the amendments in their own Statement of Defence: "it is hard for the respondents to say that they were prejudiced by these issues being raised when they themselves raised them in their defence". Pentelechuk J.A. also noted that there was no evidence that the proposed amendments were hopeless or had been proposed in bad faith. As such, the Appeal was allowed and the Appellant was granted leave to amend its Statement of Claim.

In dissent, McDonald J.A. would have held that the re-posting of allegedly defamatory material online did not constitute a "republication" and therefore that the proposed amendments were out of time and hopeless. His Lordship did not comment on the test for permitting amendments to pleadings.

JACOBS V MCELHANNEY LAND SURVEYS LTD, 2019 ABCA 220 (MCDONALD, WAKELING AND FEEHAN JJA)
Rules 1.2 (Purpose and Intention of These Rules), 4.4 (Standard Case Obligations), 4.31 (Application to Deal with Delay), 4.33 (Dismissal for Long Delay) and 6.37 (Notice to Admit)

The Appellant, McElhanney Land Surveys Ltd. ("McElhanney") initially applied to have the Action of the Plaintiff, Anthony Jacobs ("Jacobs"), struck for long delay in accordance with Rules 4.31 or 4.33. Master Schulz

initially held that Jacobs had not significantly advanced his wrongful dismissal suit against McElhanney in the applicable three-year period and dismissed the Action under Rule 4.33. Master Schulz did not consider Rule 4.31. On Appeal of Master Schulz's decision, Justice Graesser held that an Application for Summary Judgment that was never heard qualified as a significant advance of the Action and therefore granted the Appeal (the "SJ Application").

The Majority of the Court of Appeal considered whether three specifics steps either on their own or collectively constituted a "significant advance" such that it would prevent the applicability of Rule 4.33. The three steps were: (1) the SJ Application that was never heard; (2) an improper Notice to Admit provided by Jacobs under Rule 6.37; (3) or a single email from Jacobs to McElhanney's counsel asking for potential Summary Judgment hearing dates that evoked no response.

The Majority of the Court of Appeal reviewed the relevant jurisprudence in light of the foundational Rule 1.2 and noted that the parties were not any closer to the resolution of their dispute at the end of the three-year period than they were at its start. The Majority found that Jacobs had failed to reasonably advance the Action as prescribed in Rule 4.4. As such, none of the three steps on their own or collectively qualified as a "significant advance" of the Action. Accordingly, the Majority allowed the Appeal, set aside the Order of Justice Graesser, and revived the Order of Master Schulz dismissing the Action.

Justice McDonald, in His Lordship's dissenting Decision, noted that the Chambers Judge correctly cited *Bahcheli v Yorkton Securities Inc*, 2012 ABCA 166, for the proposition that the standard of review to be applied by a Chambers Judge on an Appeal from a Masters' Decision is correctness, such that no deference is owed. McDonald J.A. noted however that the Appeal from Justice Graesser's Decision is afforded deference and that palpable and overriding error is the standard of review for failing to dismiss the Action for long delay when questions are of mixed fact and law.

Justice McDonald noted that McElhanney's failure to respond to the Notice to Admit, proper or otherwise, coupled with its counsel's failure to respond to the email requesting dates for the SJ Application grounded the Chambers Judge's ruling. Given the record before the Court, Justice McDonald described Justice Graesser's ruling as "eminently reasonable" and accordingly would have dismissed the Appeal.

DAY V WOODBURN, 2019 ABQB 356 (RENKE J)
Rule 1.3 (General Authority of the Court to Provide Remedies)

The Plaintiff in the underlying Action, Douglas Day ("Mr. Day"), was arrested by members of the Edmonton Police Service ("EPS"). Mr. Day sustained injuries during his arrest and subsequently sued the Defendant officers for the tort of battery. Justice Renke dismissed the Plaintiff's Action as against all of the Defendants as they had established that the use of force in arresting Mr. Day was justified under section 25(1) of the *Criminal Code*.

In *obiter* Justice Renke addressed the issue as to whether it was appropriate to award punitive damages in an instance where punitive damages were initially sought. Justice Renke referenced Rule 1.3(2) which provides that "[a] remedy may be granted by the Court whether or not it is claimed or sought in an action" but emphasized that this Rule is discretionary. After reviewing the relevant jurisprudence, Renke J. found that, generally, relief sought should be pled, particularly when that relief is punitive damages as punitive damages is an extraordinary remedy that should be pled with particularity.

Notwithstanding the foregoing, Justice Renke found that even if the Defendants had been found to have used excessive force (which was not the case), and even if His Lordship were inclined to grant the remedy of punitive damages although it had not been pled, His Lordship would still not have awarded punitive damages on the facts of the case.

CANADIAN PACIFIC RAILWAY COMPANY V HATCH CORPORATION, 2019 ABQB 392 (KIRKER J)
Rules 1.3 (General Authority of the Court to Provide Remedies), 6.14 (Appeal from Master's Judgment or Order) and 11.25 (Real and Substantial Connection)

The parties appealed the Order of the Master who held that Alberta had jurisdiction *simpliciter* to hear the issues in dispute, but that Saskatchewan was clearly the more appropriate forum for certain of the issues. The Master stayed those claims for which Alberta was *forum non conveniens*, and allowed the rest to proceed. The Action related to an embankment failure on a railway spur located in Saskatchewan, which was designed and constructed by the Defendants. The consultants on the project had offices and operations in Alberta, but the contractor hired by the Plaintiff was based solely in Saskatchewan.

Justice Kirker reiterated that per Rule 6.14(3) an Appeal from a Master's Decision is an Appeal on the record, but that additional evidence may be considered if it is relevant and material, and that the standard of review is correctness.

The consultant Defendants had offices in Alberta, their contracts were formed in Alberta, and the contracts contained a forum selection clause granting Alberta Courts non-exclusive jurisdiction to hear disputes related to the contracts. Justice Kirker found that Alberta had jurisdiction over these Defendants. The contractor was a Saskatchewan based company who was retained in and performed its services in Saskatchewan. This Defendants' contract did not contain a forum selection clause. Justice Kirker found that there was a real and substantial connection between Alberta and the circumstances giving rise to the dispute with this Defendant. Kirker J. found that this Defendant was an integral member of an "interjurisdictional [p]roject team assembled by an Alberta domiciled client for the [p] roject" who could not discharge its obligations without reliance upon and support from other members of the team who were based in Alberta. Justice Kirker held that this interconnectedness with Alberta based contracts created a real and substantial connection under both common law, and as a "necessary or proper party" pursuant to Rule 11.25(3)(i). Justice Kirker thus held that Alberta had jurisdiction over the claims regarding this Defendant.

Justice Kirker found that the material factors informing the *forum non conveniens* analysis were the balance of convenience and expense for the parties and their witnesses; how a decision declining to exercise jurisdiction may impact the efficient conduct of the litigation; and how a decision declining to exercise jurisdiction may impact the fair conduct of the litigation and parallel proceedings in Saskatchewan. Justice Kirker found that Saskatchewan was a more appropriate forum to hear the dispute, but only if all of the issues were heard there. Justice Kirker thus held that the Master erred by staying some of the claims but not all of them. Justice Kirker also noted that staying all of the claims would prejudice the Plaintiff, who would then face limitations arguments from several of the Defendants. Justice Kirker noted that this prejudice would be avoided if the Saskatchewan Court would accept a transfer of the Action pursuant to the provisions of the *Court Jurisdiction and Proceedings Transfer Act*, SS 1997, c C-41.1 (the "CJPTA").

Justice Kirker noted that Rule 1.3(1)(a) provides for the Court to give any relief or remedy described in the *Judicature Act*, RSA 2000 c J-2 (the *"Judicature Act"*) including remedies not claimed or sought in an Action. Justice Kirker noted that section 8 of the *Judicature Act* grants the Court jurisdiction to grant any remedies which will avoid the multiplicity of legal proceedings. Justice Kirker held that Rule 1.3, section 8 of the *Judicature Act*, and the Court's inherent jurisdiction to control its own process provided the authority to make a request that the Saskatchewan Court consider whether it will accept a transfer of the Action pursuant to the *CJPTA*. This authority granted the Court the ability to make an Order which would have the effect of transferring the entire Action and affect the Defendants who did not contest jurisdiction and did not participate in the hearings.

Justice Kirker held that if the Saskatchewan Court accepted a transfer of the Action, then the entirety of the Alberta Action would be stayed, but if the Saskatchewan Court declined to accept a transfer, then all claims in the Action would proceed in the Alberta Court.

WARREN V COWLING, 2019 ABQB 403 (SHELLEY J) Rules 1.3 (General Authority of the Court to Provide Remedies), 1.4 (Procedural Orders), 3.11 (Service and Filing of Affidavits and Other Evidence in Reply and Response), 4.9 (Orders to Facilitate Proceedings), 4.11 (Ways the Court may Manage Actions), 4.31 (Application to Deal with Delay) and 4.33 (Dismissal for Long Delay)

The Applicant (Plaintiff) applied to have the requirement of an alternative dispute resolution ("ADR") process waived so that the matter could be set for Trial ("Original Application"). The parties entered a consent adjournment of the Original Application due to counsel unavailability, which provided that the hearing of the Original Application would be heard as if it was the date it was originally scheduled for because the re-scheduled date was after the agreed upon drop dead date created by Rule 4.33. After the drop dead date passed, the Defendants applied to dismiss the Action pursuant to Rules 4.33 and 4.31, noting the Notice to Profession dated February 12, 2013 suspending the requirement for a mandatory ADR process. The Plaintiff subsequently amended the Original Application to request an Order to set the matter down for Trial ("Amended Application").

The Plaintiff argued that Defendant counsel had breached the Law Society of Alberta's *Code of Conduct* by failing to notify Plaintiff counsel that the mandatory ADR process had been waived, and that such a breach disentitled the Defendants from invoking Rule 4.33. The Plaintiff also argued that had the Original Application been heard prior to the expiry of the drop dead date, he would have become aware of the suspension of the mandatory ADR process, and would have applied to amend the Original Application and set the matter down for Trial then.

Justice Shelley adopted the functional approach to determining whether either of the Original Application or the Amended Application constituted a significant step in the Action, having regard to its nature, value, quality, genuineness, timing, and outcome. Justice Shelley found that the Amended Application did not significantly advance the Action because merely filing and serving an Application but not having it heard does not significantly advance an Action. Justice Shelley also found that the Original Application did not significantly advance the Action as there was no need to apply to waive the mandatory ADR process. Shelley J. also found that Defendants' counsel was not required to notify Plaintiff's counsel of the waiver of the mandatory ADR process, and thus did not engage in conduct which would disentitle the Defendant from relying on Rule 4.33.

Shelley J. then considered whether the Court should exercise it's broad discretion to grant any remedy necessary in the circumstances by granting an Order setting the matter down for Trial, despite it not having been sought or claimed by the Applicant in the Original Application. Shelley J. cited the Rules generally, and particularly Rules 1.3, 1.4, 4.9, 4.11 and 4.31 for the authority to do so. Justice Shelley also noted that Rule 1.3(2) in particular, grants a Chambers Judge the authority to grant a remedy regardless of whether it is claimed or sought by the parties. Justice Shelley held that granting an Order which has not been sought by any of the parties should only be done where such an Order would not (1) surprise any of the parties; (2) contravene any specific provisions provided in the Rules, and (3) prejudice the party against whom the Order is made. Justice Shelley found that the Defendants would not be surprised by an Order setting the matter down for Trial, however, they would be prejudiced by the Order. Shelley J. therefore declined to grant an Order setting the matter down for Trial.

Justice Shelley also considered the Defendants' Application under Rule 4.31, and noted that the Action was 11 years old and pertained to events which took place nearly two years before the Action was commenced. Justice Shelley rejected the Plaintiff's assertion that this length of time to advance an Action involving concurrent criminal and disciplinary proceedings, and multiple Defendants, including the Edmonton Police Service. Justice Shelley found that there was no evidence that the concurrent proceedings had delayed the matter, nor that any of the Defendants had contributed to the delay. Justice Shelley also rejected the Plaintiff's argument that a dispute between his counsel as to who would retain conduct of the file after counsel of record left the firm constituted a

reasonable excuse for the delay, noting that no steps were taken to deal with the matter until the 11th hour. Justice Shelley accepted that the presumption of prejudice to the Defendants applied given that memories fade or change over time, notwithstanding that the concurrent proceedings generated significant evidence, including transcripts of witness testimony. Justice Shelley also noted that the nature of the claims (involving allegations of professional misconduct) required the claims to be prosecuted expeditiously to minimize the damage caused to the Defendants' reputations, and the failure to do so weighed in favour of dismissing the Action pursuant to Rule 4.31.

The Plaintiff's Application was dismissed and the Defendants' Application was granted, with the result that the Action was dismissed.

SCOTIA MORTGAGE CORPORATION V MESHKATI, 2019 ABQB 267 (WOOLLEY J)
Rules 1.4 (Procedural Orders), 3.43 (How to Make Claim Against Co-Defendant), 4.36 (Discontinuance of Claim) and 7.3 (Summary Judgment)

The Plaintiff mortgagor sought to recover a loss incurred upon foreclosure. An Application for Summary Judgment was brought against the straw purchasers of the mortgaged property (the "Arlains"). At first instance, Master Farrington dismissed the Application.

On Appeal, Justice Woolley reviewed the test for Summary Judgment as recently settled by the Alberta Court of Appeal in *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49. Specifically, Her Ladyship emphasized that a finding of Summary Judgment would require i) a record allowing resolution of the dispute on a summary basis; ii) the Plaintiff to demonstrate facts proven on a balance of probabilities establishing that the Arlains had no defence; iii) that the Arlains not show a genuine issue requiring a Trial based on the nature of the issue or its merits; and iv) the Court's confidence in the state of the record sufficient to exercise discretion in summarily resolving the dispute. Justice Woolley found this test to have been satisfied.

Upon reaching the decision to grant Summary Judgment, the Court addressed the potential prejudice to the Arlains' Co-Defendants should the Plaintiff discontinue the Action subsequent to the Order for Summary Judgment. The Court observed that a Notice of Claim Against Co-Defendants had been served by the Arlains pursuant to Rule 3.43, and that the law was unclear whether the Arlains would be able to pursue their Co-Defendants if the Plaintiff discontinued the Action. As such, Justice Woolley exercised the Court's authority in Rule 1.4 to order that the Plaintiff not be permitted to discontinue the Action against the Arlains' Co-Defendants, pursuant to Rule 4.36(1), without leave of the Court.

ROYAL BANK OF CANADA V WARIONMOR, 2019 ABQB 419 (MASTER ROBERTSON)
Rules 1.4 (Procedural Orders), 4.31 (Application to Deal with Delay), 4.33 (Dismissal for Long Delay), 5.12 (Penalty for Not Serving Affidavit of Records) and 7.3 (Summary Judgment)

Applications were brought and jointly considered in two related Actions involving the Royal Bank of Canada ("RBC") and Andrew Warionmor. In one Action, RBC sought Summary Judgment in respect of a credit card debt; in the other, Mr. Warionmor and others sought Summary Judgment against RBC respecting an alleged mishandling of a trust account.

In respect of RBC's debt claim, Mr. Warionmor argued that his RBC insurance should cover the debts owing. Master Robertson held that this was not a defence to the claims, and was merely a misunderstanding on Mr. Warionmor's part. Mr. Warionmor also argued that he had not signed his credit cards, and that his credit card applications were not signed because they were completed online. Master Robertson found that these were not defences to the amount owing.

Mr. Warionmor further argued that RBC did not file its Affidavit of Records within 3 months as required by the Rules. The Master noted that RBC had failed to do so based on "the misapprehension that if it was going to seek summary judgment it need not file" an Affidavit of

Records, but explained that this is not the law. Master Robertson then explained that "Mr. Warionmor's complaint is really about the delay in proceeding with the action as a whole", which caused him to believe the claim had been abandoned. The Master reviewed Rules 4.31 and 4.33, which address delay when there is no significant advance in the Action for a period of 3 years or more, or where delay has resulted in significant prejudice to a Defendant. Here, RBC's delay did not result in significant prejudice, and was for 22 months, as opposed to 3 years. The Master also noted that while Rule 5.12 contemplates a Costs penalty when an Affidavit of Records is filed late, Mr. Warionmor's Affidavit of Records in his related Action was also late, so no Costs award was made. The Affidavit of Records issue was also no defence to the debt claim.

Master Robertson next considered Mr. Warionmor's claim against RBC, which included allegations of defamation and breach of trust. Since factual disputes existed respecting RBC's activities, the Master held that the claim could not be determined summarily. Master Robertson also offered comments and guidance to Mr. Warionmor pursuant to Rule 1.4(2)(g), to advise him that he had not pleaded facts supporting his assertion of defamation in his Statement of Claim, and "offer[ed] the observation that parts of Mr. Warionmor's approach may be fundamentally incorrect in law".

Master Robertson ultimately granted Summary Judgment in favour of RBC, and dismissed Mr. Warionmor's Applications for Summary Judgment. Contractual solicitor and client Costs were awarded to RBC.

DOMENIC CONSTRUCTION LTD V PRIMEWEST CAPITAL CORP, 2019 ABQB 430 (KUBIK J)
Rules 1.4 (Procedural Orders), 4.10 (Assistance by the Court), 5.2 (When Something is Relevant and Material), 5.6 (Form and Contents of Affidavit of Records) and 5.17 (People Who May be Questioned)

In an Action that had been characterized by numerous interlocutory applications and extensive questioning on Affidavits, an Application brought by the Plaintiff before Master Robertson proposed significant amendments to the Statement of Claim. Certain amendments were permitted, subject to a stay of proceedings to provide for an opportunity to Appeal the amendments without further advancement of the litigation. The Plaintiff appealed the stay, and the Defendants brought an Application to extend the terms of the stay.

As a preliminary consideration, the Court observed in reference to Rule 1.4(2)(h) that Master Robertson had sufficient jurisdiction to order a stay. Turning to review of the merits of the stay, Justice Kubik agreed with Master Robertson that there would be irreparable harm in the event a stay was not granted. The Court explained that pleadings set the scope of relevance and materiality in accordance with Rule 5.2 and by extension govern document production pursuant to Rule 5.6 and Questioning pursuant to Rule 5.17. In the absence of a stay, it was possible for prejudicial evidence to be discovered on the basis of unsettled pleadings which would not otherwise be discoverable should the scope of pleadings be changed upon Appeal.

As the Court found that Master Robertson was correct in granting a stay, an extension of the terms of the stay necessarily followed to ensure no proceedings would take place until at least the determination of the Appeal of the amendments. In the interim, the Court invoked Rule 4.10 in directing the parties to attend a case conference to set a path forward in line with the foundational Rules.

HAMM V CANADA (ATTORNEY GENERAL), 2019 ABQB 247 (JERKE J)
Rules 1.5 (Rule Contravention, Non-compliance and Irregularities), 3.68 (Court Options to Deal with Significant Deficiencies), 6.14 (Appeal from Master's Judgment or Order), 7.1 (Application to Resolve Particular Questions or Issues), 7.3 (Summary Judgment) and 13.18 (Types of Affidavit)

The Plaintiffs/Appellants applied to strike portions of the Statement of Defence under Rule 7.1(3), and alternatively, for Summary Judgment on the issue of liability in a claim for damages arising from wrongful imprisonment and breach of sections 7 and 12 of the *Charter of Rights and Freedoms*. The Appellants relied on their successful *habeas*

corpus Applications as proof of liability under the Action, claiming that the Defendant could not assert a defence to the civil Action because of the doctrine of issue estoppel. The Master held that the doctrine of issue estoppel did not apply, and dismissed the Application. The Appellants appealed that Decision.

The Respondent filed an Affidavit on the Appeal, containing additional evidence consisting of the transcript and records from the *habeas corpus* Application. Justice Jerke noted that Rule 6.14 permits the Court to consider additional relevant and material evidence on Appeal from a Master's Decision. Justice Jerke found that the evidence pertaining to the *habeas corpus* Application was relevant and material to the issues on Appeal and therefore relied upon it. Justice Jerke also noted that several paragraphs in the Appellants' Affidavits were improper pursuant to Rule 13.18, as they contained argument, not evidence.

Justice Jerke held that Rule 7.1(3) was inapplicable to the present circumstance as it applies to determinations made during the Trial of an issue: it does not apply to determinations made in a separate proceeding. Justice Jerke also noted that Rule 7.1(3) does not permit striking out a Statement of Defence, only striking a Statement of Claim or requiring an amendment to a pleading. Jerke J. noted that the correct Rule was 3.68, and relied on the Court's power under Rule 1.5 to rectify non-compliance or irregularities with the Rules, and so considered the Application as one brought under Rule 3.68, and not Rule 7.1.

Justice Jerke found that the nature of a *habeas corpus* Application requires the Respondent to demonstrate that it provided a high level of procedural fairness after the Applicant has demonstrated a detention or loss of residual liberty and a basis or legitimate ground for why the detention was unlawful. Because of that nature, a determination under a *habeas corpus* Application does not make findings of fact. Jerke J. held that the Appellants' causes of action required proving a factual foundation and thus, that the *habeas corpus* Application did not estop the Respondent from claiming justification as a defence to the claims. Justice Jerke dismissed the Application to strike. Justice Jerke confirmed that Summary Judgment will be appropriate where the trier of fact can make the necessary findings of fact, apply the law to the facts, and where the process is a proportionate, more expeditious and less expensive means to achieve a just result. Justice Jerke also noted that the facts need only be proved on a balance of probabilities, but that establishing the facts to that standard is not a proxy for summary adjudication, which requires proving no genuine issue requiring Trial.

Justice Jerke found that the evidence on the Appeal did not establish the elements of the torts or *Charter* breaches alleged independent of the fact that the *habeas corpus* Application was brought and granted. Justice Jerke found that the claims in the Appellants' Affidavits that they were "unlawfully" placed in administrative segregation in breach of their *Charter* rights were mere bald assertions and/or inadmissible opinion evidence. As a result, Justice Jerke found that the evidence fell "far short" of that required to demonstrate that there is no merit to the Respondent's defence, and as such, the Application for Summary Judgment was dismissed.

ACCIONA INFRASTRUCTURE CANADA INC V POSCO DAEWOO CORPORATION, 2019 ABCA 241 (SLATTER, BIELBY AND WAKELING JJA)
Rules 1.5 (Rule Contravention, Non-Compliance and Irregularities), 11.3 (Agreement Between Parties), 11.16 (Service on Lawyer), 11.25 (Real and Substantial Connection), 11.26 (Methods of Service Outside Alberta), 11.27 (Validating Service) and 14.88 (Cost Awards)

After the parties submitted disputes to arbitration, collateral disputes arose about the pace and conduct of the arbitration. This Appeal related to those collateral issues. The Respondent to the arbitration had issued an Originating Application and obtained *ex parte* Orders appointing arbitrators under the *International Commercial Arbitration Act* RSA 2000, c 1-5, consolidating two arbitrations, and validating service of the Originating Application. The Appellant had unsuccessfully applied to set those Orders aside, and appealed that Decision to the Court of Appeal.

The Appellant argued that service of the Originating Application in Korea was deficient because, while it was

served in accordance with the *Hague Convention*, the Order validating service of the Originating Application had been granted before service had actually been effected, and because an Order for service *ex juris* had not been obtained.

The Majority explained that service of a commencement document outside of Alberta and Canada is governed by Rules 11.25(2) and 11.26. Under Rule 11.25(2), there must be a real and substantial connection to Alberta, the Court must have permitted service outside of Canada, and the person served with the commencement document must have also been served with a copy of the Order permitting service outside of Canada. Under Rule 11.26(1), a document may be served outside of Alberta by a method provided for in the Rules, in accordance with the *Hague Convention*, or in accordance with the law of the jurisdiction in which service occurs. With respect to the real and substantial connection test, the Majority explained that Rule 11.25(3) sets out presumptions of a "real and substantial connection", and that Rule 11.27 permits the Court to validate irregular methods of service. In addition to there being a "real and substantial connection" to Alberta, the Applicant is also expected to show a "good arguable case" for Alberta to have jurisdiction over the matter.

Here, the Chambers Judge had determined that it need not consider international service *ex juris* if the Court already has jurisdiction over the Defendant, but the Majority disagreed. It held that "the Plaintiff's mere assertion that the [C]ourt has jurisdiction [...] does not justify non-compliance with the threshold requirements" in the Rules for service outside of Canada. The Respondent argued that service *ex juris* should retroactively be ordered because the irregularity could be cured. However, the Majority held that "the deficiencies in the service are substantive, and would preclude the exercise of such discretion" to fix the contravention. As such, the Majority allowed the Appeal, and set aside the Orders.

Lastly, the Majority noted that pursuant to Rule 14.88(1), there is a presumption that the successful party is entitled to Costs of the Appeal. However, here, the Appellant suffered no prejudice, and appeared to simply be delaying the arbitration by using technical arguments. As such, it did not award Costs to either party.

Justice Wakeling, concurring in result, queried whether any contravention could be cured by Rule 1.5, which contains a "general curative provision", or Rule 11.27, which permits validation of service not in compliance with the Rules. Justice Wakeling held that the Respondents failed to comply with Rule 11.25(2)(b), and further explained that the contravention could not be cured. Rule 1.5 could not be relied upon because it does not apply to irregular methods and manners of service. Rule 11.3 could also not be relied on as the parties had not contractually agreed to a mode of service. Rule 11.27, which does apply to the manner of service, could similarly not be relied upon by the Respondents because it refers to service in a "manner" not specified by the Rules, but in this case, the Respondent's failure to obtain an Order did not have to do with the "manner" of service.

BRACE V MCKEN, 2019 ABCA 135 (ROWBOTHAM, VELDHUIS AND HUGHES JJA)
Rules 1.8 (Interpretation Act), 4.33 (Dismissal for Long Delay), 11.2 (Service Not Invalid), 11.20 (Service of Documents, Other Than Commencement Documents, In Alberta), 11.22 (Recorded Mail Service), 11.28 (Substitutional Service) and 11.30 (Proving Service of Documents)

The Appellant/Defendant applied under Rule 4.33 to have the Plaintiff's Action dismissed due to long delay. The Appellant filed its Statement of Defence on December 12, 2014, and copies of the Statement of Defence were sent to the Plaintiff's address for service on the Statement of Claim by regular mail, registered mail, and express post the same day. The Appellant filed an Affidavit of service by a legal assistant setting out the methods of delivery of the Statement of Defence which were attempted, and that the registered mail was returned as "unclaimed" and the express post was returned as "refused". The Appellant applied under Rule 4.33 on January 29, 2018. The Respondent/Plaintiff asserted that he did not receive the Statement of Defence until mid-April, 2015 when he had returned to Alberta from Newfoundland, such that 3 years had not elapsed without a significant advance and

that in any event, settlement offers had been made which significantly advanced the Action.

The Application was brought before a Master who granted the Application in the Respondent's absence after being satisfied that service was in order. The Respondent appealed and a Justice granted the Appeal, finding that the Application was not properly served, declining to deal with the merits of the Application. The Appellant appealed and asked the Court to deal with the merits of the Application.

The Court of Appeal noted that the Rules do not provide for any mechanism for service to be affected by regular mail apart from an Order for Substitutional Service under Rule 11.28. The Panel also noted that the presumption of service by regular mail in section 23 of the *Interpretation Act*, RSA 2000, c I-8 was specifically excluded by Rule 1.8(c).

The Court of Appeal noted that service can be affected by "recorded mail" under Rules 11.20 and 11.22, where "recorded mail" is a form of document delivery "in which receipt of the document must be acknowledged in writing". The Court of Appeal found that both the registered mail and express post constituted forms of "recorded mail" under the Rules.

Rule 11.22(2) deems service 7 days after the recorded mail is sent, regardless of whether receipt is acknowledged, and Rule 11.2(c) and (d) provides that service is not invalid by reason only that the addressee refuses to take delivery of recorded mail or is otherwise not present at the address for service and has not provided a current mailing address. The Court of Appeal thus held that the Statement of Defence had been properly served under the Rules on December 19, 2014, 7 days after it was sent by recorded mail, and that this service was properly proved under Rule 11.30 through the Affidavit of Service of a legal assistant which described the means of service.

The Court of Appeal assessed the circumstances of the offers to settle to assess whether they had significantly advanced the Action, and found that they had not done so, as they were mere monetary offers which did not narrow the issues, complete discovery of documents or information, or clarify the parties' positions. A letter sent by the Respondent demanding resolution of the matter and threatening to report the Appellant to the Law Society was similarly found to not have significantly advanced the Action for the same reason.

The Appeal was allowed, and the Action was dismissed under Rule 4.33.

1985 SAWRIDGE TRUST V ALBERTA (PUBLIC TRUSTEE), 2019 ABCA 243 (O'FERRALL, SCHUTZ AND STREKAF JJA)
Rules 2.6 (Representative Actions), 2.10 (Intervenor Status) and 10.50 (Costs Imposed on Lawyer)

This was an Appeal of a substantial Costs award made against a lawyer personally. The Appellant, Kennedy, represented her client in an Application for intervenor status in a further Application for Advice and Direction. The Application for Advice and Direction was in regards to whether the definition of "beneficiary" for a trust for the members of the Sawridge First Nation (SFN) should be changed.

The Case Management Justice found Kennedy's Application for intervenor status on behalf of her client was a collateral attack and an abuse of process. Kennedy's band member status had already been decided in previous cases. Moreover, Kennedy had brought the Application for intervenor status on behalf of her client as well as his "brothers and sisters," even though there was no evidence that Kennedy had been retained or instructed by these other people.

The Court confirmed that Rule 10.50 allows the Court to grant Costs against a lawyer personally if the lawyer has engaged in serious misconduct. However, this is an exceptional remedy that will only be granted in rare cases where the lawyer's actions have seriously undermined the Court's authority or seriously interfered with the administration of justice.

The Panel did not agree with the Case Management Justice's finding that the Application for intervenor status

constituted a collateral attack or serious misconduct as contemplated in Rule 10.50. The Application was not specifically to have the client's status as a band member determined or reconsidered, and therefore the Application was not necessarily a collateral attack on the previous decisions that addressed the status issue. Moreover, the Panel noted that Rule 2.10 allows the Court to grant an Applicant intervenor status subject to any terms specified by the Court. Therefore, it would have been open for the Court to consider Kennedy's client's Application based on factors apart from the status question.

In regards to Kennedy's apparent acting without instructions from her client's brothers and sisters, Kennedy submitted that the Application was a representative motion pursuant to Rule 2.6. That Rule states that where numerous individuals have a common interest in a claim, one or more of those individuals may make the claim or be authorized by the Court to make the claim on behalf of the group. The Court rejected this argument as there was no evidence in the Application itself or in the prior proceedings that Kennedy's client was pursuing a representative motion. The evidence suggested that Kennedy's acting without instructions was much more likely in error or the result of negligence. However, the Court did not find that this amounted to "gross neglect or inaccuracy" that would justify a personal award of Costs under Rule 10.50.

The Panel granted the Appeal, reiterating again that a personal award of Costs against a lawyer is only justifiable in exceptional circumstances.

BISSKY V MACLEOD, 2019 ABQB 378 (ROOKE ACJ)
Rules 2.22 (Self-Represented Litigants), 2.23 (Assistance Before the Court), 3.68 (Court Options to Deal With Significant Deficiencies), 9.4 (Signing Judgments and Orders), 13.7 (Pleadings: Other Requirements) and 14.5 (Appeals Only With Permission)

In February of 2019, Associate Chief Justice Rooke was notified that the Court had received an Apparently Vexatious Application or Proceeding ("AVAP") per Rule 3.68 and Civil Practice Note No. 7 ("CPN7"). Rooke A.C.J. reviewed the identified the relevant document and concluded that the Statement of Claim had three apparent defects: it sought $5 million in damages without any apparent basis; it did not plead the particulars of alleged defamation per Rule 13.7(f); and it was composed of pleadings that were "bald allegations" and therefore an inadequate basis for the Court and Defendant to respond.

The Plaintiff, ("Ms. Bissky"), had also initiated 11 Provincial Court of Alberta Civil Actions, two of which were lawsuits against her ex-partner Mr. MacDonald. In both instances those claims were withdrawn in a pre-trial hearing. Associate Chief Justice Rooke noted that Ms. Bissky had engaged in abusive litigation directed against Mr. MacDonald and Ms. MacLeod. Rooke A.C.J. found Ms. Bissky to be extremely antagonistic and hostile towards Mr. MacDonald and Ms. MacLeod and found her conduct to be for an improper purpose. Rooke A.C.J. noted that litigation for an improper purpose is a very serious form of litigation misconduct which subverts public confidence in the proper administration of justice, and which strongly favours Court intervention.

Associate Chief Justice Rooke reviewed the relevant jurisprudence and concluded, on the Court's own motion and under its inherent jurisdiction, that Ms. Bissky should be subject to indefinite Court access restrictions, and was declared a vexatious litigant. His Lordship ordered various restrictions including: (1) that if a single Appeal Judge grants Ms. Bissky leave to commence an Appeal, Ms. Bissky may be required to apply for permission to Appeal under Rule 14.5(1)(j); and (2) precluding Ms. Bissky from acting as an agent under Rules 2.22 and 2.23, or any other form of representation in Court proceedings.

Finally, His Lordship ordered that Ms. Bissky's approval as to the form and content of the Order was not required per Rule 9.4(2)(c).

PIERCE V ALBERTA (APPEALS COMMISSION FOR ALBERTA WORKERS' COMPENSATION), 2019 ABQB 443 (LOPARCO J)
Rules 3.2 (How to Start an Action), 3.8 (Originating Applications and Associated Evidence), 3.15 (Originating Application for Judicial Review), 3.21 (Limit on Questioning), 3.22 (Evidence on Judicial Review) and 10.49 (Penalty for Contravening Rules)

The Applicant, Price, applied to the Court to challenge a decision by the Workers' Compensation Board ("WCB") Appeals Commission.

The Applicant commenced the Action by filing an Originating Application in the form described in Rule 3.8. This caused some confusion as the Applicant also served the Attorney General of Alberta, which would indicate that the Application was for Judicial Review. As the Court noted, the Application requirements for Judicial Review are typically different than the Application requirements for a statutory Appeal. The requirements for a Judicial Review Application are spelled out in Rule 3.15.

The Court resolved this confusion by noting its authority under Rule 3.2 to make any procedural Order necessary to ensure an Action proceeds in the proper forum. The Application was then treated as an Application for Judicial Review.

As a preliminary matter, the Court considered the Applicant's request to have new evidence considered in the Judicial Review hearing. With reference to Rule 3.21, which limits Questioning on a Judicial Review Application, and Rule 3.22, which stipulates the evidence the Court can consider on Judicial Review, the Court rejected the Applicant's request to introduce new evidence.

The Court dismissed the Application. The Respondent, WCB, asked the Court to consider awarding Costs against the Applicant's lawyer because the Applicant's Brief was filed late. However, the Court did not find that the lawyer's behaviour amounted to more than a "mistake, error in judgment or mere negligence" as required by Rule 10.49. The Court declined to award Costs against the lawyer.

FLOCK ESTATE V FLOCK, 2019 ABCA 194 (SLATTER, BIELBY AND WAKELING JJA)
Rules 3.8 (Originating Applications and Associated Evidence), 3.11 (Service and Filing of Affidavits and Other Evidence in Reply and Response), 3.14 (Originating Application Evidence (Other Than Judicial Review), 4.27 (Status of Formal Offer to Settle and Acceptance), 4.28 (Confidentiality of Formal Offer to Settle), 8.14 (Unavailable or Unwilling Witness) and 12.3 (Application of Other Parts)

The Appellant, Doran Flock ("Mr. Flock"), and the late Arlene Flock ("Mrs. Flock") were married in 1982. They purchased a residence as joint tenants in 1993 (the "Property"), separated in 1994, and were divorced in 1999. Mr. Flock commenced a matrimonial property Action in 1996 (the "Matrimonial Property Action") and that Action had not been resolved when Mrs. Flock died in 2014.

After a complex series of Applications, Actions, an Originating Application, and an arbitration (the "Arbitration"), the Matrimonial Property Action was dismissed for delay under Rule 4.33. The issue before the Alberta Court of Appeal (the "ABCA" or the "Court") concerned the admissibility of evidence that might be used to resolve the remaining dispute which consisted mostly of an Originating Application brought by Mrs. Flock's estate (the "Estate") for retroactive severance of the joint tenancy of the Property (the "Application").

The issues on Appeal included, *inter alia*: (1) whether any of the evidence permitted by the Chambers Judge was inadmissible because it was privileged or hearsay; and (2) whether any of the findings from the Arbitration/Matrimonial Property Action were admissible as evidence.

In turning to the issue of privileged documents, the Court referenced Rules 4.27 and 4.28 and emphasized that Rule 4.28 expressly provides that Formal Offers are not to be disclosed to the Court until after the dispute is resolved. Accordingly, the Court allowed the Appeal on this point and ordered that anything in the Affidavits or exhibits relating to without prejudice correspondence or offers of settlement was to be struck from the record.

In dealing with the issues of admissibility, the ABCA referenced Rules 3.8 and 3.14 which govern Actions commenced by Originating Application and outline the threshold requirement for evidence in such cases. The Court noted that Rule 3.11, which deals with replies to Originating Applications, parallels Rule 3.8(1)(d) and also requires that the Respondent give notice of the evidence it proposes to use "a reasonable time before the originating application is to be heard".

Further, the Court highlighted that by virtue of Rule 12.3 the foregoing Rules apply to the Application issued by the Estate for retroactive severance of the joint tenancy. The Court found that Rule 3.14(1)(f) allows the use of evidence filed in other proceedings with the leave of the Court and that some of the evidence assembled from the Matrimonial Property Action or the Arbitration may therefore be relevant.

Referencing Rule 8.14(1)(a), pertaining to unavailable witnesses, the Court noted that, given unavailability of the deceased Mrs. Flock, this Rule may also be applicable. Accordingly, the Court concluded that the most economic and efficient procedure would be to permit the use of any such evidence in the Application rather than attempting to replicate it and cautioned that, if either party intended on doing so, the necessary consent or approval of the Trial Court should be obtained.

MORRISON V GALVANIC APPLIED SCIENCES INC, 2019 ABCA 207 (SLATTER, BIELBY AND WAKELING JJA)
Rules 3.8 (Originating Applications and Associated Evidence), 4.31 (Application to Deal with Delay) and 4.33 (Dismissal for Long Delay)

The Appellants, minority shareholders in Galvanic Applied Sciences Inc ("Galvanic"), were dissatisfied with an offer they had received to sell their shares in Galvanic (the "Shares"). The Appellants applied in October of 2013, under section 191 of the *Business Corporations Act*, RSA 2000, c B-9, for an Order determining the fair value of the Shares. Their Originating Application was not accompanied by a supporting Affidavit but stated that it would "come later". Almost three years to the day after the Appellants filed their Originating Application, Mr. Morrison filed the Affidavit (the "Affidavit"). The admissible parts of the Affidavit simply collected documents which were predominantly publicly available on SEDAR.

In April of 2017, the Respondents applied for an Order dismissing the Appellants' Action for delay under Rules 4.31 and 4.33. The Appellants' case was dismissed by both Master Robertson at first instance and Justice Kenny at the Court of Queen's Bench on Appeal. The Alberta Court of Appeal found no reason to exercise its discretion in the Appellants' favor and allow them to continue with their Action.

In interpreting delay under Rule 4.31, the Court of Appeal noted that Mr. Morrison's justification for the delay was attributable to the fact that he was not a lawyer and did not know what information should be in the Affidavit, however, the Court did not find this argument persuasive. The Court found Mr. Morrison to be a sophisticated businessman and investor, familiar with the applicable jurisprudence, and that Mr. Morrison had never claimed to be unable to afford to retain counsel and he had, in fact, sought legal advice for various portions of the Affidavit.

Moreover, in assessing delay under Rule 4.33, the Court noted that the Appellants' provision of the Affidavit did not constitute a significant advance. The Court found that most of the information contained in the Affidavit should have been stated in the Appellants' Originating Application. The Court referenced Rule 3.8(1) which requires that an "originating application must … state the claim and the basis for it". As such, the content of the Affidavit did not increase the likelihood that either the parties or the Court would have sufficient information to rationally asses the merits of the parties' positions and be in a better positon to either settle or adjudicate the Action. As such, the Affidavit did not advance the Action to allow for an extension of the three year timeline under Rule 4.33. Accordingly, the Court dismissed the Appeal under both Rules 4.31 and 4.33.

HOLDEN (VILLAGE) V SEN, 2019 ABQB 472 (MAH J) Rules 3.13 (Questioning on Affidavit and Questioning Witnesses), 3.14 (Originating Application Evidence (Other than Judicial Review)), 3.68 (Court Options to Deal with Significant Deficiencies), 6.7 (Questioning on Affidavit in Support, Response and Reply to Application), 6.8 (Questioning Witness Before Hearing), 10.52 (Declaration of Civil Contempt), 10.53 (Punishment for Civil Contempt of Court) and 13.18 (Types of Affidavit)

The Applicant Village brought a contempt Application pursuant to Rule 10.52, alleging that the Respondent was in deliberate non-compliance with a Court Order requiring him to clean up a property he owned in the Applicant's Village. The Respondent claimed that a declaration of contempt and the resulting remedies are of equitable origin requiring the Applicant to come to the Court with clean hands, which it did not have as there were other buildings in the Village in as bad or worse shape as his building. The Respondent cross-applied to require answers to questions posed on cross-examination of the Applicant's affiant. The Respondent also cross-applied under Rule 3.68 to strike a secretarial Affidavit put forward by the Applicant, which contained the report of an inspector.

Justice Mah noted that contempt Applications are rooted in common law, and statutorily codified by Rules 10.52 and 10.53. As such, equitable principles do not apply *per se*. However, Mah J. pointed out that contempt is a *quasi-criminal* offence, requiring proof beyond a reasonable doubt that: there is a clear and unequivocal Court Order; the Respondent had actual knowledge of that Order; and the Respondent intentionally (or recklessly) did the act prohibited by the Order, or failed to do the act that the Order compels. Justice Mah noted that the Applicant's conduct is therefore relevant where that conduct has the effect of preventing, inhibiting, or frustrating the Respondent's compliance with the Order.

Justice Mah found that the Respondent's allegations of unclean hands were really impermissible collateral attacks on the Order that he was supposed be complying with, and not a defence that demonstrated interference or frustration with his attempts to comply with the Order.

Justice Mah next considered the Respondent's Cross-Application to compel answers posed on cross-examination of the Applicant's affiant. Justice Mah found that the questions posed related to either the opinion of the affiant (a lay witness) or the merits of the underlying Order, neither of which were properly the subject of the contempt Application and, accordingly, did not have to be answered.

Justice Mah also considered the Respondent's argument that the Applicant's secretarial Affidavit should be struck as it was an attempt to subvert justice by shielding the inspector from cross-examination, and because it was not in compliance with Rule 13.18(3) because it contained hearsay. Justice Mah found that the secretarial affidavit did not have the intent or effect of subverting justice because Rules 3.13 and 3.14 allow for persons who have not given Affidavit evidence to be examined under oath for the purposes of obtaining a transcript for an Originating Application (which Rules correspond with Rules 6.7 and 6.8 for regular motions).

Justice Mah noted that all or part of an Affidavit can be struck under Rule 3.68(4) if it is frivolous, irrelevant, or improper. Justice Mah held that the secretarial Affidavit was improper as it contained impermissible hearsay. Justice Mah noted that a contempt Application is a final Application, and thus, Rule 13.18(3) applies to preclude hearsay evidence, unless such evidence meets a common law, statutory, or principled exception to the hearsay rule such that it would be admitted into evidence at Trial. Additionally, given the *quasi-criminal* nature of a contempt Application, Justice Mah held that inadmissible hearsay should not be permitted. The Applicant made no effort to justify the admission of the secretarial Affidavit on the basis of an exception to the hearsay rule. Justice Mah therefore granted the Respondent's Cross-Application to strike the secretarial Affidavit under Rule 3.68 as it was improper because of its hearsay nature.

Lastly, Justice Mah found that the language of the Order compelling the Respondent to act was not sufficiently clear to demonstrate that his actions constituted deliberate non-compliance. Justice Mah provided clarification to the parties concerning their respective obligations under the

Order at issue, and adjourned the Application *sine die*. Justice Mah directed that the parties were to bear their own Costs.

MINSHULL V LED SIGN SUPPLY INC, 2019 ABQB 424 (MASTER PROWSE)
Rules 3.36 (Judgment in Default of Defence and Noting in Default), 3.58 (Status of Counterclaim), 3.60 (Application of Rules to Counterclaims), 4.31 (Application to Deal with Delay), 4.33 (Dismissal for Long Delay), 5.5 (When Affidavit of Records must be Served) and 5.12 (Penalty for Not Serving Affidavit of Records)

The Defendants by Counterclaim applied to dismiss the Counterclaim for delay pursuant to Rules 4.33 and 4.31. They also applied for penalty Costs for failure to file an Affidavit of Records as required.

With respect to the Rule 4.33 Application, the question was whether three or more years had passed without a significant advance of the Counterclaim. The last activity regarding the Counterclaim was service of an Affidavit of Records (the "AoR") by the Plaintiffs by Counterclaim and the filing (but not service) of a Statement of Defence to the Counterclaim by another party nearly three years prior to the AoR.

The Court ruled that the AoR was a significant advance. Master Prowse explained that an Affidavit of Records can be a significant advance where it lists the relevant documents in a litigant's possession and also confirms that no other documents are within that litigant's possession, and that the emphasis is on substance over form. Even if there are technical problems with the document itself, it will generally advance the Action if the relevant information about the extent of a litigant's documents is disclosed.

The Court also considered whether the filing of the Statement of Defence nearly three years prior was a significant advance. If not, the AoR would have been served out of time. The issue with the Statement of Defence was that it was filed but not served. However, Master Prowse confirmed that the filing of a Statement of Defence, even without service, still prevents a Noting in Default from being filed under Rule 3.36. Therefore, the filing of a Statement of Defence was a significant advance.

In regard to the Rule 4.31 Application, the Court considered whether there had been delay causing significant prejudice, real or presumed. Applying the factors set out in *Humphreys v Trebilcock*, 2017 ABCA 116, the Court concluded that the delay had been inordinate and inexcusable; however, it was also apparent that no significant prejudice had been suffered. Therefore, the Rule 4.31 Application was also dismissed.

Notwithstanding the dismissal of the delay Applications, the Court still considered the lateness of the AoR. The Court confirmed that Rule 3.58 provides that a Counterclaim is an independent Action and that Rule 3.60 states that a Rule applying to a Statement of Claim applies equally to a pleading in respect of a Counterclaim. Therefore, Rule 5.5(2) required that the AoR in this case be served within three months of service of a Statement of Defence.

The Plaintiff by Counterclaim took nearly three years to serve an Affidavit of Records. Therefore, Master Prowse granted penalty Costs under Rule 5.12 in the amount of $1,000.

NELSON & NELSON V CONDOMINIUM CORPORATION NO. 0013187, 2019 ABQB 426 (HOLLINS J)
Rules 3.45 (Form of Third Party Claim), 7.3 (Summary Judgment) and 13.5 (Variation of Time Periods)

Justice Hollins heard an Application by the Third Parties, Nelson & Nelson and Stephen B. Nelson ("Nelson") (collectively, the "Third Parties") to strike or summarily dismiss, under Rule 7.3, a number of Third-Party claims issued against them (the "Application"). The underlying matter involved a number of Actions, all arising from a fire in 2012. In the underlying Actions, the main parties were the Condominium Corporation No. 0013187 ("Condo Corp") which managed the building, Aviva Insurance Company of Canada ("Aviva") which insured the property, Dominion General Contractors Ltd ("Dominion") retained as the general contractor, and Nelson the lawyer who received

and distributed the insurance proceeds. Aviva and Condo Corp alleged that Nelson erroneously paid $225,000 to Dominion that ought not to have been paid.

There were six Third-Party claims at issue, all of which the Third Parties contended should be set aside or dismissed under: (1) the *Limitations Act*, RSA 2000, c L-12; (2) Rule 7.3(1)(b) for lack of merit; and (3) Rule 3.45 for being filed outside the time allowed. Hollins J. considered the factors set out by the Alberta Court of Appeal in the recent and seminal case of *Weir-Jones Technical Services Inc. v Purolator*, 2019 ABCA 49 and found that the Applications were not appropriate for determination by way of Summary Judgment. Justice Hollins noted that the disputes on material facts, both with respect to Nelson's potential liability and also with respect to the chronology underlying the limitations defence, made it impossible to determine the case against the Third Parties summarily.

Turning to the issue of the late filings under Rule 3.45, Justice Hollins noted that the 6-month time period in Rule 3.45 can be extended in the discretion of the Court provided in Rule 13.5. Hollins J. explained that in the absence of an agreement, a Defendant can apply for an extension of the timelines. Justice Hollins noted, as identified by Nelson's counsel, that Aviva and Condo Corp circumvented the above procedure by simply filing the Third Party Claims without leave, thereby putting Nelson in a position where he had to apply to set them aside. Justice Hollins emphasized that Her Ladyship did not condone the actions of experienced counsel by-passing what they know to be the expected procedure under Rule 13.5, and assured the Third Parties that the onus under Rule 3.45 was not reversed, and that Her Ladyship analyzed this portion of the Application as though it were an Application brought by Aviva and Condo Corp.

Nonetheless, Her Ladyship found that, in this case, the delay was not so long as to obviate any discussion of prejudice but neither so short as to obviate any requirement of a reasonable explanation therefor. The explanation provided, being that the discovery of the accounting leading to the Third Party Claim was delayed, coupled with the language of the Rule 13.5 (which is not as stringent as the *Limitations Act*) made that explanation acceptable to the Court. Accordingly, the Third Parties' Application was dismissed.

SWALEH V LLOYD, 2019 ABQB 348 (LOPARCO J)
Rules 3.62 (Amending Pleading), 3.65 (Permission of Court to Amendment Before or After Close of Pleadings) and 3.74 (Adding, Removing or Substituting Parties after Close of Pleadings)

The Plaintiff claimed against his former lawyer alleging professional negligence, and later applied to add the Law Society of Alberta ("LSA") and Alberta Lawyers' Insurance Association ("ALIA") as Defendants to the Action and to amend his Statement of Claim to add further particulars against them. The Plaintiff's Application was dismissed by a Master in Chambers, and the Plaintiff appealed.

Justice Loparco noted that a party may amend his or her pleadings after the close of pleadings with the Court's permission, pursuant to Rule 3.62 and 3.65. Additionally, Rule 3.74 governs the addition of new parties to an Action. Her Ladyship then explained that in general, pleadings may be amended "no matter how careless or late", subject to limited exceptions. One of those exceptions is where the proposed amendments are "hopeless, such that the plea would have been struck if originally pled". Additionally, to add a party in accordance with Rule 3.74, a link should exist between the facts originally pled and the proposed new Defendant(s). Although the evidentiary bar for allowing amendments is low, "an amendment that alleges new facts must be supported by evidence".

Justice Loparco reviewed the proposed amendments and determined that the Plaintiff's proposed claims against the LSA and ALIA were hopeless. As such, Her Ladyship found that the Master made no reviewable errors, and dismissed the Appeal.

ASHRAF V ZINNER, 2019 ABQB 389 (LABRENZ J)
Rules 3.62 (Amending Pleading), 3.67 (Close of Pleadings), 7.1 (Application to Resolve Particular Questions or Issues) and 10.6 (Void Provisions)

Justice Labrenz presided over a Trial of the Plaintiff's claim against the Defendant lawyer. The Plaintiff sought to prove that he had been negligently represented by the Defendant with respect to a claim against the Plaintiff's former employer (the "Underlying Action"). At the commencement of Trial, His Lordship invoked Rule 7.1 to sever determination of damages from determination of liability, noting the consent of the parties to that effect.

In the Underlying Action, the Statement of Claim drafted by the Defendant had failed to disclose a cause of action. Rather than file a Statement of Defence, the Defendant employer applied to strike the Statement of Claim, and was successful. Justice Labrenz considered the Defendant's liability for negligent drafting, as well as the Defendant's failure, upon realization of an important omission, to advise the Plaintiff that leave to amend the Statement of Claim pursuant to Rule 3.62(1)(a) was not necessary because pleadings had not closed pursuant to Rule 3.67.

The Court found that the Defendant owed duties to the Plaintiff in tort and contract. Moreover, while the retainer agreement purported to limit the Defendant's liability in the event of any dispute respecting legal fees, that provision was void as an improper limitation of liability pursuant to Rule 10.6. Having found duties unaffected by any limitation of liability, the Court went on to determine that those duties had been breached by the Defendant.

DELTA HOTELS NO 2 HOLDINGS LTD V CALM SHORE VENTURES (1992) INC, 2019 ABQB 434 (NIELSEN J)
Rules 3.62 (Amending Pleadings) and 3.74 (Adding, Removing or Substituting Parties after Close of Pleadings)

The Plaintiff applied to amend the Statement of Claim, including amendments which added affiliates of the Plaintiff (the "Affiliates") as additional Plaintiffs. The Defendants consented to all amendments except those which added the Affiliates as Plaintiffs, arguing that the limitation period had expired for the Affiliates to advance claims and that in any event the doctrine of laches and acquiescence applied to bar their claim.

Justice Nielsen noted that amendments after the close of pleadings require consent or leave of the Court per Rule 3.62, and that where an amendment seeks to add a party to a proceeding, Rule 3.62 states that Rule 3.74 applies which indicates that the Court may only make an Order to add, remove, or substitute a party where: the consent of the person proposed to be added as a party has been filed with the Application and no prejudice would result which cannot be remedied by an award of Costs, an adjournment, or the imposition of terms. Nielsen J. also noted that the general rule with amendments is that they will be allowed no matter how late or careless unless there is prejudice that cannot be repaired.

Justice Nielsen held that the expiry of the limitation date for the Affiliates to bring a claim did not prevent the amendments because of the application of section 6 of the *Limitations Act*, RSA c L- 12 which allows parties to be added to a proceeding in certain circumstances, including where no new claims or facts are added to the claim. Justice Nielsen found that the addition of the Affiliates did not add any new claims or facts, but that it simply particularized the damages claims and which party sustained which damage, and thus, the requirements of section 6 of the *Limitations Act* applied. In particular, Justice Nielsen found that the Defendants failed to satisfy their burden of establishing that they would suffer actual prejudice if the amendments were allowed.

Justice Nielsen did not find that acquiescence or laches applied in the circumstances of this case. The Application was allowed.

LATHAM (RE), 2019 ABQB 46 (HENDERSON J)
Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 10.29 (General Rule for Payment of Litigation Costs)

After Bryan Latham brought two previous Applications for *habeas corpus*, he again applied for *habeas corpus* on the basis that a decision to suspend and then revoke his day

parole was unreasonable and in violation of his right to procedural fairness. Mr. Latham required leave to file the new *habeas corpus* Application because he was subject to interim Court access restrictions, so he wrote to Chief Justice Moreau seeking permission to file the Application. The Chief Justice designated Justice Henderson to respond to the Applications. Justice Henderson held that the *habeas corpus* Application had potential merit and should be evaluated further.

As a preliminary issue, Justice Henderson noted that in a previous hearing in relation to Mr. Latham's *habeas corpus* Application, the Respondent had been given a deadline to apply to strike out the filing under Rule 3.68. The Respondent had done so, later abandoned its Rule 3.68 Application, and a substantive *habeas corpus* Application occurred. Next, Henderson J. substantially considered Mr. Latham's *habeas corpus* Application, and dismissed it.

Henderson J. then noted that since Mr. Latham was unsuccessful, it was presumed that he would owe Costs pursuant to Rule 10.29(1). His Lordship noted that there are a number of indicia of abusive conduct which may increase Costs following an unsuccessful *habeas corpus* Application, but that those indicia were not present during Mr. Latham's Application. As such, the Court ordered that Mr. Latham pay $100 in Costs immediately. His Lordship also invited the parties to provide submissions respecting whether greater Court access restrictions should be imposed on Mr. Latham.

MCCLINTIC V CANADA (CORRECTIONAL SERVICE), 2019 ABQB 342 (HENDERSON J)
Rule 3.68 (Court Options to Deal with Significant Deficiencies)

The Court considered a *habeas corpus* Application by the Applicant, McClintic, a prison inmate serving a life sentence for murder. McClintic had been reclassified as a medium security inmate and moved from a Healing Lodge to an Edmonton penitentiary, and was then moved to a penitentiary in Kitchener, Ontario.

Upon receiving the Application, the Court decided to invoke the "show cause" process established in Civil Practice Note 7. That process is invoked when the Court identifies potential significant issues with an Application such that it could be struck pursuant to Rule 3.68. The party filing the Application then has an opportunity to respond in writing to the issues identified and to demonstrate why the Application should continue.

The Court identified two key issues with McClintic's Application. First, there was a real question whether Alberta had jurisdiction to hear the Application as McClintic was no longer being housed in an Alberta facility. Second, McClintic had filed no evidence in support of her Application. Therefore, there was no basis upon which the Court could make a ruling on the Application.

As a result of these two issues, the Court stayed the Application pending the completion of the Civil Practice Note 7 process. McClintic was invited to submit written submissions addressing the issues with her Application, while the Respondents were permitted to file a written reply in response. Once written submissions were completed by the parties, or, once McClintic failed to file written submissions within the deadline imposed, the Court would render a decision as to whether the Application would eventually be struck pursuant to Rule 3.68.

UBAH V CANADIAN NATURAL RESOURCES LIMITED, 2019 ABQB 347 (ROOKE ACJ)
Rule 3.68 (Court Options to Deal with Significant Deficiencies)

The Defendants initiated a review process as set out in Civil Practice Note 7 ("CPN7"), alleging that the Statement of Claim in the Action was an Apparently Vexatious Application or Proceeding ("AVAP"). The CPN7 process was initiated by sending correspondence and the Statement of Claim to the Court. The Defendants asserted that the Action was an attempt to initiate a collateral attack on two Provincial Court of Alberta proceedings which were currently under Appeal to the Court of Queen's Bench ("PC Claims"), and should therefore be struck pursuant to Rule 3.68.

Rooke A.C.J. reviewed the Defendants' correspondence along with the Statement of Claim and concluded that the Action appeared to advance claims which were properly within the jurisdiction of the Alberta Human Rights Commission, and that the balance of the Action appeared to be a collateral attack on the PC Claims. Pursuant to CPN7, Rooke A.C.J. provided the Plaintiff with notice of the apparent defects and gave until March 18, 2019 to provide up to 10 pages of argument as to why the claims had merit and should not be struck for being vexatious or abusive. Rooke A.C.J. also imposed interim Court access restrictions, pending resolution of the CPN7 process. The Plaintiff initially responded to the initial review decision by challenging the legitimacy of the CPN7 procedure and the interim Court access restrictions. The Plaintiff subsequently provided 10 pages of argument along with 157 pages of evidence.

Rooke A.C.J. noted that the CPN7 process is a form of Application under Rule 3.68, and as such, no evidence is admissible to consider whether the Statement of Claim is, on its face, an abuse of process. The Associate Chief Justice indicated that the correspondence to initiate a CPN7 process can include and make reference to: i) briefly stating that the Court does not have jurisdiction for the subject matter, including specific authorities; and/or ii) Court materials to establish that the Action is a collateral attack on other proceedings, in breach of Court access restrictions, or blocked by a binding legal agreement. Rooke A.C.J. noted that if argument or reference to additional materials are necessary for the Court to understand why an Action is an abuse of process then it is not a "clearer case of abuse… on its face" and is thus outside of the proper scope of the CPN7 process.

Rooke A.C.J. held that the Plaintiff's response to the initial review decision was itself evidence that the Action was being pursued in a manner which is abusive and vexatious. Rooke A.C.J. noted that the Plaintiff acknowledged that certain elements of the claim were properly matters within the jurisdiction of the AHRC and that the balance of the claim was premised on the PC Claims, with certain additions. Rooke A.C.J. held that the Statement of Claim was in fact a collateral attack on the PC Claims and therefore an abuse of process which should be struck pursuant to Rule 3.68.

Rooke A.C.J. noted that the CPN7 process permits the immediate imposition of indefinite Court access restrictions without further steps or submissions, however, noted that further submissions were appropriate as to whether indefinite Court access restrictions on the Plaintiff were appropriate. Rooke A.C.J. invited submissions from the parties as to whether such further access restrictions were appropriate. The Application to strike the claim pursuant to Rule 3.68 was granted.

MARTINEZ V CHAFFIN, 2019 ABQB 349 (MARRIOTT J)
Rule 3.68 (Court Options to Deal with Significant Deficiencies)

The Plaintiff filed a Statement of Claim alleging that he had been harmed by incorrect information which was spread through a police conspiracy. Several of the Defendants brought an Application requesting that the Plaintiff be subject to Court access restrictions as a vexatious litigant.

Justice Marriott summarized the details of the Action, and also reviewed the Plaintiff's other related litigation in Alberta, Manitoba, British Columbia, and at the Federal Court. Her Ladyship evaluated the need for Court access restrictions pursuant to the Court's inherent jurisdiction, and found various indicia of abusive litigation: collateral attacks and forum shopping; hopeless proceedings; escalating proceedings; bringing proceedings for improper purposes; scandalous language in pleadings or before the Court; unsubstantiated allegations of conspiracy; and exhibiting characteristics of querulous paranoia. Justice Marriott concluded that global Court access restrictions were appropriate, and ordered various restrictions as requested by the Applicants.

Justice Marriott also invoked Civil Practice Note No. 7 ("CPN7"), initiating a multi-step process for evaluating whether the Statement of Claim should be struck pursuant to Rule 3.68. Her Ladyship explained that CPN7 permits a document-only "show cause" mechanism through which a Court filing may be reviewed to determine whether it is

either unmeritorious and has no prospect of success, or is otherwise abusive and vexatious. Justice Marriott recited the procedural steps laid out in CPN7, starting with the Plaintiff's onus to provide written submissions defending why the Statement of Claim should not be struck.

GOERTZ V JOHN, 2019 ABQB 350 (ROOKE ACJ)
Rules 3.68 (Court Options to Deal with Significant Deficiencies), 7.2 (Application for Judgment) and 7.3 (Summary Judgment)

Rooke A.C.J. received a letter from the Defendant's counsel requesting that the Plaintiff's claim be subject to review pursuant to Civil Practice Note No. 7 ("CPN7"), as an "Apparent Vexatious Application or Proceeding" on the basis that it was an abusive attempt to re-litigate an issue that was previously decided. His Lordship explained that the CPN7 is a summary, document-based process used to manage abusive litigation through Rule 3.68. The intention of CPN7 is "to examine whether a specific filing, on its face, is without merit, or is an abuse of process" as described in Rule 3.68. It is an "extremely blunt instrument" to be applied in "the clearest of cases of abuse", not those involving questions of fact which relate to the merits of a proceeding. In this case, the letter from the Defendant's counsel contained details which "in effect depose[d] facts" and contained argument.

Rooke A.C.J. disregarded the facts and argument contained in the letter and evaluated the Plaintiff's Statement of Claim independently. His Lordship determined that the Statement of Claim appeared to include separate issues that were different from the prior proceeding, and that the two proceedings did "not fully overlap". As such, it was not appropriate to use CPN7 to strike the claim. Additionally, His Lordship noted that the Defendant had made submissions in response to the CPN7 request, but that they were premature: "CPN7 would have permitted [him] the opportunity to make submissions after I had conducted my review".

Lastly, Rooke A.C.J. commented that no negative inference should be drawn against either party as a result of his Decision, as the scope and operation of CPN7, a new procedure, was still being defined through Court decisions. His Lordship also clarified that the Decision had no implications for other steps available to the Defendant, including bringing a full Rule 3.68 Application or applying for Summary Judgment in accordance with Rules 7.2 and 7.3.

REEVES V GRASSI, 2019 ABQB 416 (MASTER ROBERTSON)
Rules 3.68 (Court Options to Deal with Significant Deficiencies), 6.3 (Applications Generally), 6.12 (If Person Does not get Notice of Application) and 7.3 (Summary Judgment)

The Defendants applied to strike the claim against a corporate Defendant pursuant to Rule 3.68 and alternatively, to summarily dismiss the claim against that Defendant on the basis that the corporate Defendant had been struck by the corporate registry, remained struck, and the limitation period to claim against it had expired. The Plaintiffs/Respondents cross applied for a declaration that service of the Statement of Claim on the struck corporation's sole former shareholder and director constituted valid service on the corporation. The Plaintiffs also cross applied to have the corporation revived under section 210 of the *Business Corporations Act*, RSA 2000 c B-9 (*"ABCA"*).

The Defendants contended that the Plaintiffs' Cross Application to revive the corporation did not comply with the requirements of section 210 of the *ABCA*, and therefore, should be dismissed. Master Robertson adjourned the revival Application pursuant to Rule 6.12(b) to allow the registrar to be properly notified and to respond formally to the Application.

The Plaintiffs asserted an alternative Application that the Statement of Claim could be amended to allow the struck corporation to be added as a Defendant to the Action, as if it were not named as a Defendant in the first place, pursuant to section 6(4) of the *Limitations Act*, RSA 2000, c L-12 (the *"Limitations Act"*). The Defendants objected to this alternative Application and argued that the Plaintiffs did not specify it was making its Application pursuant to section 6 of the *Limitations Act*, and therefore, did not

comply with Rule 6.3(2)(d) which requires a pleading to "refer to any provision of an enactment or rule relied on" unless the Court permits otherwise. Master Robertson noted that Rule 6.3(2)(d) requires reference to the specific provision of an enactment that the Applicant is relying on, not just the enactment itself. Master Robertson commented that the purpose of the Rule is to demonstrate that "the applicant knows why it believes that [it] is entitled to the relief, and to give the respondent an understanding of the case it has to meet". Master Robertson noted that violations of Rule 6.3(2)(d) are "frequent, and it is troubling", but determined that he did not need to address this objection substantively, as he did not make an Order under section 6 of the *Limitations Act*.

Master Robertson held that section 227 of the ABCA specifically allowed for corporations to be served with a Statement of Claim after they had been struck, and that this provision did not require the corporation to be revived by the Plaintiff prior to service. Accordingly, Master Robertson declared that service on the sole former shareholder and director was valid service on the corporation, and dismissed the Defendants' Applications under Rule 3.68 and 7.3.

MARTINEZ V CHAFFIN, 2019 ABQB 439 (MARRIOTT J)
Rules 3.68 (Court Options to Deal with Significant Deficiencies), 9.4 (Signing Judgments and Orders) and 10.29 (General Rule for Payment of Litigation Costs)

After the Court imposed strict Court access restrictions on the Applicant, a Civil Practice Note No. 7 ("CPN7") "show cause" procedure was initiated in respect of the Plaintiff's outstanding Action against the Defendants. The Plaintiff was asked to make submissions of up to 10 pages indicating why his Amended Statement of Claim should not be struck as an abuse of process pursuant to Rule 3.68.

The Plaintiff's submissions did not comply with the Court's instructions concerning the CPN7 process, or the Court access restrictions imposed on him. The Plaintiff provided correspondence to Justice Marriott and counsel for the Defendants opposing a "Dispute" and "Order", attempted to file a 25-page package of materials in contravention of his Court access restrictions, and emailed the Court a 5-page document titled "Written Submission and Response" which Justice Marriott treated as his submissions. The Plaintiff's submissions disputed previous decisions and asserted that the Court was under "investigations". Her Ladyship noted that the Plaintiff had a pattern of rejecting Court decisions due to "investigations".

Justice Marriott explained that CPN7 is a "show cause" procedure through which the party filing the document must establish a claim's basis in law. Her Ladyship noted that there were defects in the Plaintiff's claim, and found that his written submissions did not respond to those issues. Instead, the Plaintiff's submissions merely asserted that his litigation was "valid", "noble and just", and "cannot fail". As such, the Action was terminated in accordance with Rule 3.68.

Her Ladyship explained that the Defendants were presumptively due Costs in accordance with Rule 10.29, and that the Plaintiff's plea for "$250,000,000 Million Dollars" meant that his claim fell under Column 5 of Schedule "C". The Plaintiff's approval of the Order was dispensed with in accordance with Rule 9.4(2)(c).

WOITT V ALBERTA MENTAL HEALTH REVIEW BOARD, 2019 ABQB 449 (THOMAS J)
Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 9.4 (Signing Judgments and Orders)

The Plaintiff, Michael Woitt ("Mr. Woitt") filed an "Amended Statement of Claim" naming Alberta Health Services as the Defendant. The Court's file did not include an earlier original filed Statement of Claim. Subsequently, Mr. Woitt filed a "Statement of Claim" that named Alberta Mental Health Board (the "Board") as the Defendant. Other than the difference in the named Defendant, the two documents were identical save for the numbering of certain paragraphs, and other minor textual variations.

Counsel for the Board wrote to the Court, per paragraph 6 of Civil Practice Note No. 7 ("CPN7"), requesting a review of Mr. Woitt's Statement of Claim, indicating that

the filing appeared on its face to be frivolous, vexatious, and an abuse of process (an "AVAP"). The Court concluded that Mr. Woitt's pleadings did appear to be hopeless litigation, as the pleadings: (1) did not provide a basis for the responding parties to make a meaningful response; and (2) were disproportionate and excessive. Per the CPN7 procedure, Mr. Woitt had 14 days to make a written submission of no more than 10 pages to explain why his litigation has a basis in law and should not be struck out per Rule 3.68 (the "AVAP Response").

Justice Thomas reviewed the 10 pages provided by Mr. Woitt in the AVAP Response and concluded that, on a balance of probabilities, the claims were an abuse of the Court's processes, and should be struck out per Rule 3.68. Justice Thomas found that the litigation was based predominantly on mental health issues, and the resulting delusion and distorted perceptions. As such, His Lordship declined to order Costs against Mr. Woitt but did recommend to Mr. Woitt that, to avoid unfavourable Cost awards and Court access restrictions, Mr. Woitt should, prior to initiating any future litigation, first consult with public legal assistance resources.

Justice Thomas concluded by ordering counsel for Alberta Health Services to prepare a Court Order giving effect to this decision and that Mr. Woitt's approval of the form and content of that Order was not required, per Rule 9.4(2)(c).

RUBY V MILLS, 2019 ABQB 451 (HENDERSON J)
Rules 3.68 (Court Options to Deal with Significant Deficiencies), 7.3 (Summary Judgment) and 13.7 (Pleadings: Other Requirements)

The Plaintiffs, who had been tenants in a residence owned by the Defendant, brought an Action against the Defendant on various grounds. The Defendant filed an Application to strike out the Amended Statement of Claim pursuant to Rule 3.68, on the basis that i) the Court had no jurisdiction, referencing Rule 3.68(a); ii) all matters within the claim were *res judicata*; iii) the Amended Statement of Claim disclosed no reasonable claim or defence to a claim, referencing Rule 3.68(b); iv) the Amended Statement of Claim was frivolous, irrelevant, or improper, referencing Rule 3.68(c); and v) the Amended Statement of Claim constituted an abuse of process, referencing Rule 3.68(d).

The Court declined to strike the Plaintiffs' Amended Statement of Claim for lack of jurisdiction. With respect to the allegedly criminal jurisdiction of the allegations of theft, forgery, fraud, and perjury, the Court found that theft could be interpreted as the tort of conversion, fraud could be interpreted as the tort of fraud, and that forgery and perjury were not pleaded as causes of action. More generally, the significant quantum of damages sought was properly before the Court of Queen's Bench as a remedy exceeding the jurisdiction of the Residential Tenancy Dispute Resolution Service ("RTDRS").

With respect to the Defendant's argument that the claim should be struck as *res judicata*, the Court also referenced financial jurisdiction. The Defendant had previously applied for and received relief before the RTDRS, and the Order arising from that proceeding had not been appealed by the Plaintiffs. The Court explained that while cause of action estoppel, a branch of the doctrine of *res judicata*, was primarily unavailable on account of the fact that the Plaintiffs had not previously sought relief before the RTDRS, the relief requested in the Amended Statement of Claim would in any event have been beyond the RTDRS' jurisdiction to consider.

In reviewing whether the Amended Statement of Claim disclosed a reasonable claim, the Court cited *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 for the proposition that a "claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action". Taking note of this threshold, Justice Henderson was inclined to allow claims for employment loss, unpaid wages, negligence, and conversion to proceed.

The Court went on to strike all other purported causes of action as failing to disclose a reasonable cause of action. With respect to allegations of fraud and defamation, the Court noted that such allegations must be pleaded with particularity pursuant to Rule 13.7. In light of noncompliance with this requirement, as well as the

Plaintiffs' failure to plead facts supporting either the elements of civil fraud or defamation, the allegations of fraud and defamation were struck. While Affidavit evidence was available to support these causes of action, Rule 3.68(3) precluded resort to Affidavit evidence in testing a pleading's disclosure of a reasonable claim. With respect to the Plaintiffs' claims of "premeditated negligence causing physical, bodily harm"; "premeditated negligence causing mental, psychological harm"; and "discrimination under oath", Justice Henderson summarily struck such allegations for failing to amount to causes of actions recognizable in civil proceedings.

Finally, the Court's analysis turned to consideration of the Amended Statement of Claim as vexatious, which would appropriately attract review of the Amended Statement of Claim as either "frivolous, irrelevant, or improper", pursuant to Rule 3.68(c), or an "abuse of process", pursuant to Rule 3.68(d). Justice Henderson observed numerous indicia of vexatious litigation present on the face of the Amended Statement of Claim, and as such, was prepared to strike the Amended Statement of Claim in its entirety pursuant to Rule 3.68(c). This decision was reinforced upon noting that the abuse of process doctrine referenced in Rule 3.68(d) is remarkably flexible, focussed on the integrity of the administration of justice, which favoured striking the whole of the Amended Statement of Claim in this case.

Given the determination that the Amended Statement of Claim be struck in its entirety pursuant to Rule 3.68, the Court held that it was unnecessary to consider the Defendant's alternative Application for Summary Judgment pursuant to Rule 7.3.

LESLIE V EDMONTON INSTITUTION, 2019 ABQB 469 (HENDERSON J)
Rule 3.68 (Court Options to Deal with Significant Deficiencies)

The Court received a document titled "Originating Application" (the "Application") and an Affidavit from Ricky Leslie ("Mr. Leslie"). Mr. Leslie was an inmate at the Stony Mountain Institution, operated by Correctional Service Canada, and located near Winnipeg, Manitoba. In the Application, Mr. Leslie sought to be placed in a facility in Edmonton to be closer to family and community. Mr. Leslie cited the Canada *Charter of Rights and Freedoms*, sections 10(c) and 24(1) in the Application and the Court therefore evaluated the Application as an Application for relief via *habeas corpus*.

Justice Henderson's review of the Application identified what appeared to be a potential issue in accordance with Civil Practice Note No. 7 ("CPN7"), the document-based "show cause" process to evaluate whether the Application should be struck out per Rule 3.68.

Henderson J. noted that it is trite law that the jurisdiction of the Alberta Court of Queen's Bench is limited to the province of Alberta and that habeas corpus is only a remedy for the here and now. Accordingly, given that Mr. Leslie no longer had any connection to Alberta and its Courts, Justice Henderson found that it was unclear as to what basis an Alberta Court had to conduct a *habeas corpus* review.

Justice Henderson concluded by finding that the Application warranted review per CPN7 that the Application was to be stayed until further notice, and that after receipt of Mr. Leslie's written submission and the Respondents' written reply, if any, the Court would render its final decision on whether the Application should be struck out in whole or in part, per Rule 3.68 (CPN7, para 3(e)).

ANDERSON V LEE, 2019 ABCA 126 (WAKELING, PENTELECHUK AND FEEHAN JJA)
Rules 3.68 (Court Options to Deal with Significant Deficiencies), 4.21 (Involvement of Judge After Process Concludes) and 7.3 (Summary Judgment)

The Plaintiff/Appellant, Anderson, appealed a ruling by Mahoney J. of the Court of Queen's Bench summarily dismissing her Statement of Claim against the Defendant/Respondent, Lee. The Statement of Claim was dismissed on the basis that it contravened an Order granted by Mahoney J. following a Judicial Dispute Resolution (the "JDR Order"). The Order stated that no further Actions would be brought by Anderson or her business against Anderson's former partner or his friends and business associates. The

Defendant/Respondent, Lee, was a friend and business associate of Anderson's former partner.

Anderson had filed a Statement of Claim before the JDR Order which alleged that Lee conspired with Anderson's former partner to divert funds owing to Anderson. Anderson then served it on Lee days after the JDR Order was made.

The issues before the Court of Appeal Panel were whether the Statement of Claim had been properly dismissed, and whether Mahoney J. should not have recused himself from the dismissal Application in given that His Lordship also oversaw the JDR.

The Panel ruled that the Court below did not err in striking Anderson's Statement of Claim. The fact that Anderson had filed the Statement of Claim before the JDR Order prohibiting the bringing of further claims was irrelevant. By prosecuting the claim, Anderson was "bringing" it within the meaning of the JDR Order. The Statement of Claim was an abuse of process within the meaning of Rule 3.68, as the issues contemplated within the Statement of Claim were substantially the same as the issues resolved at the JDR. Therefore, Mahoney J. was correct to strike the Statement of Claim pursuant to Rule 7.3.

Moreover, the Panel ruled that there was no cause for Mahoney J. to recuse himself. Rule 4.21 allows a Judge overseeing a JDR to hear subsequent Applications in regards to the JDR if there is written agreement from the parties. The parties in this case specifically requested in writing that Mahoney J. hear the dismissal Application and they confirmed their consent on the record during the hearing. The Appeal was dismissed with Costs.

LUKASZUK V LANDREX DEVELOPERS INC, 2019 ABQB 410 (LEMA J)
Rule 3.74 (Adding, Removing or Substituting Parties after Close of Pleadings)

The Plaintiffs sought to add a new corporate Defendant to their Action pursuant to Rule 3.74. Master Schlosser had denied the addition on the ground that insufficient evidence was advanced in support of amendment. On Appeal before Justice Lema, additional evidence was offered to justify the amendment.

The Court noted that while the evidentiary threshold respecting non-trivial amendment of pleadings is low, some evidence is necessary. However, Justice Lema was unable to ascertain any evidence that connected the proposed Defendant with the harm pleaded in the Statement of Claim, including by reference to the newly advanced evidence, which at most established the proposed Defendant's involvement in related, but as yet un-pleaded, activities. The Appeal was dismissed.

ORUBOR V BORDEN LADNER GERVAIS LLP, 2019 ABQB 328 (MASTER ROBERTSON)
Rules 4.22 (Considerations for Security for Costs Order), 4.23 (Contents of Security for Costs Order) and 10.22 (Payment of Lawyer's Services and Contents of Lawyer's Account)

The Defendants applied for a Security for Costs order against the Plaintiffs six years after the Action had commenced. The Plaintiffs resisted the Application on the basis of delay, and the Defendants countered by arguing that they only became aware of the Plaintiffs' impecuniosity after being served with a Notice to Pay from the CRA in regards to the Plaintiffs.

Master Robertson applied the factors for granting a Security for Costs order enumerated under Rule 4.22. Firstly, it was evident that the Plaintiffs would not be able to pay a Costs award. The individual Plaintiff made only a modest income, had little equity in his home, and he was facing a Notice to Pay from the CRA. Moreover, the corporate Plaintiff's financial statements showed no meaningful assets that could be used to pay a Costs award.

Second, the merits of the Action were not decisive one way or the other in regards to Security for Costs. Master Robertson noted that Security for Costs may be appropriate where there is no merit to a claim or where a defence is "weak at best." However, neither of these descriptors applied in this case.

Third, Master Robertson considered whether a Security for Costs award would unduly prejudice the Plaintiffs' ability to continue the Action. The Court is supposed to balance the presumption that a successful litigant is entitled to Costs without denying litigants the right to pursue their claims. In this case, the Plaintiff's argued that they would be prevented from pursuing their claim due to their impecuniosity. However, Master Robertson determined that "it is their impecuniosity that justifies the requirement for security for costs."

Finally, Rule 4.22(e) requires the Court to consider any other factor the Court deems appropriate before granting a Security for Costs award. Master Robertson addressed the issue of the delay in bringing the Application and confirmed that the delay had been sufficiently explained.

Master Robertson granted the Application but only awarded Security for Costs for the steps to be taken until preparation for Trial. The Master also advised that an additional Application for Security for Costs should be expected if the matter was not resolved before Trial. In closing, the Court confirmed that the Defendants' Counterclaim for unpaid legal fees would not be struck if the Action was dismissed for failure to post security for Costs, and that Rule 10.22 would continue to apply to the Counterclaim, prohibiting any Default Judgment in the absence of a defence without the Court's permission. Master Robertson also confirmed that Rule 4.23(4) continued to apply, allowing the Court to adjust the security ordered if necessary.

PATTON V HORSE RACING ALBERTA, 2019 ABCA 182 (FEEHAN JA)
Rules 4.22 (Considerations for Security for Costs Order), 7.3 (Summary Judgment), 10.31 (Court-Ordered Costs Award), 10.33 (Court Considerations in Making Costs Award), 10.43 (Certification of Costs Payable) and 14.67 (Security for Costs)

After the Applicant applied to appeal an Order summarily dismissing his claim pursuant to Rule 7.3(1)(b) on the basis that it disclosed no cause of action, the Respondent applied for Security for Costs pursuant to Rules 4.22 and 14.67(1).

Justice Feehan first noted that the Court may order Security for Costs where it is just and reasonable to do so, upon consideration of the factors listed in Rule 4.22(a) to (e). Those factors include the ability to enforce an Order against assets in Alberta, the ability of the Respondent to pay a Costs award, the merits of the Action, the potential prejudice that such an Order could cause, and any other consideration that may be appropriate. His Lordship further noted that a "Costs Award" refers to a Costs Order made pursuant to Rule 10.31 or 10.43.

Justice Feehan determined that the Appellant had failed to pay previous Costs awards and that his Appeal appeared to have "little or no merit". Additionally, there was found to be no evidence that a Security for Costs Order would prejudice the Appellant, and it was not known whether the Appellant had any assets in Alberta against which Costs could be enforced. As such, Justice Feehan ordered that the Appellant pay $2,750 into Court as Security for Costs, failing which the Appeal would be deemed abandoned. Costs of the Application were awarded against the Appellant.

CAMBARERI V CAMBARERI, 2019 ABCA 218 (PAPERNY JA)
Rules 4.22 (Considerations for Security for Costs Order) and 14.67 (Security for Costs)

The Applicant wife sought Security for Costs in an Appeal filed by her husband in a family matter. The husband had appealed the striking of his pleadings by the Case Management Judge, which were struck because he had previously persistently failed to provide disclosure, was held in contempt of Court as a result, and had failed to purge his contempt or pay fines for the non-disclosure for over a year.

Justice Paperny explained that pursuant to Rules 4.22 and 14.67, the Court of Appeal may order an Appellant to provide Security for Costs where it is just and reasonable, having regard to the Appellant's ability to pay a Costs award; the likelihood of the Respondent being able to enforce a Judgment or Order against the Appellant's assets in Alberta; the merits of the proposed Appeal; whether an Order for Security for Costs would unduly prejudice the Appellant's ability to move forward with the Appeal; and

any other appropriate consideration. Her Ladyship noted that the Appellant had not filed materials in response to the Application, but his counsel had submitted orally that a Security for Costs Order would have an "injunctive effect against the Appeal".

Her Ladyship noted that the Appellant's submissions were not supported by the record, and that the onus was on the Appellant to establish that the Appeal had a reasonable prospect of success. Based on the record, Justice Paperny was not satisfied that there was any reasonable prospect of success, and noted that "access to justice principles do not entitle a person to engage in litigation without cost consequences". As such, Security for Costs was ordered in the amount of $8,000.

ELKOW V SANA, 2019 ABCA 257 (PENTELECHUK JA)
Rules 4.22 (Considerations for Security for Costs Order) and 14.67 (Security for Costs)

The Court considered an Application by the Respondent, Elkow, for an Order for Security for Costs in regards to the Appeal filed by the Appellant, Sana. After having been found to have defamed Elkow at Trial, Sana appealed the damages assessment following that ruling.

Pentelechuk J.A. confirmed that Rule 14.67(1) allows a single Appeal Judge to award Security for Costs, and if the security is not paid as ordered, the Appeal is deemed to have been abandoned and the Applicant party is entitled to Costs. Pentelechuk J.A. also noted that the factors to be considered when assessing whether Security for Costs is warranted are listed under Rule 4.22.

The Court found that the factors weighed in favour of granting the Application. It is unlikely that Sana could pay a Costs award at the conclusion of the Appeal. Sana had outstanding Costs awards against her and was heavily indebted to Legal Aid. Moreover, it was very unlikely that Sana's Appeal would be successful, as it was limited to the question of damages which is assessed on a very deferential standard.

Pentelechuk J.A. granted the Application for Security for Costs.

DEZOTELL HOLDINGS LTD V ST JEAN, 2019 ABQB 476 (HO J)
Rules 4.24 (Formal Offers to Settle), 10.28 (Definition of "Party"), 10.29 (General Rule for Payment of Litigation Costs), 10.33 (When Costs Award may be Made) and Schedule C

The Plaintiff had sought to enforce a right of first refusal in respect of a parcel of land against two groups, defined in the Decision as the "Ames Defendants" and the "Cammaert Defendants". The Cammaert Defendants' former lawyer was also named as a Third Party. The Action against the Ames Defendants was dismissed in Master's Chambers, and that Decision was upheld on Appeal. The parties were then unable to reach an agreement respecting Costs.

The Ames Defendants argued they were entitled to Costs as the successful party, and that double Costs should be awarded from the date of service of their Formal Offer pursuant to Rule 4.24. They argued that the Cammaert Defendants and Third Party should be jointly and severally liable for Costs, and that an enhanced Costs award should be made against the Third Party because he had unsuccessfully alleged land titles fraud. They also submitted that Costs should be awarded pursuant to Column 4 of Schedule C, due to the value of the land at issue.

The Cammaert Defendants and Third Party both argued that Costs should be awarded against the Plaintiff only. The Cammaert Defendants emphasized that the Plaintiff was the only named Respondent in the Summary Dismissal Application, and that the Ames Defendants had recognized in writing that the Cammaert Defendants were not parties to the Application and not "adverse in interest" to them. The Third Party similarly argued that, based on the wording of Rule 10.29, the Court is limited in awarding Costs in favour of the successful party "against the unsuccessful party" to an Application.

The Plaintiff argued that the Ames Defendants should be entitled to one set of Costs jointly as against the Plaintiff, Cammaert Defendants, and Third Party; and acknowledged that the Ames Defendants' Formal Offer would have Costs ramifications due to Rule 4.24. The Plaintiff further argued

that Costs should be awarded based on Column 1 of Schedule C, since its claim was not a monetary one.

The Plaintiff, Cammaert Defendants, and Third Party each also argued that if Costs were to be awarded against them, deductions should be made to account for the fact that counsel for the Ames Defendants had failed to appear for a matter in Master's Chambers.

In determining whether the Cammaert Defendants and Third Party should be considered "unsuccessful parties" liable to pay Costs, Justice Ho considered Rule 10.28, which defines the word "party". Her Ladyship determined that since the Cammaert Defendants and Third Party each participated in the appealed Application, they were "parties" and may be subject to a Costs award for the purposes of Rule 10.29. Her Ladyship explained that the "expansive" definition of "party" in Rule 10.28 was consistent with the factors set out in Rule 10.33, and the Court's overall discretion respecting Costs.

Next, Her Ladyship considered whether the Third Party should be subject to an "enhanced" Costs award due to his unfounded allegations of land titles fraud. Her Ladyship explained that the Court has discretion to award enhanced Costs where serious or unfounded allegations of fraud are made, but declined to do so because the claim was not an unreasonable one, and had been raised by other parties in the Action as well. Lastly, Justice Ho determined that Costs should be awarded in accordance with Column 4 of Schedule C, since the land at issue had been appraised at a value of $540,000 to $560,000. The Plaintiff was also required to pay additional Costs to the Ames Defendants based on the Formal Offer that was served upon it pursuant to Rule 4.24. Costs were discounted by $500 to account for the Ames Defendants' failure to appear in Masters Chambers on one occasion.

IMPACT PAINTING LTD V MAN-SHIELD (ALTA) CONSTRUCTION INC, 2019 ABCA 213 (WATSON, SCHUTZ AND CRIGHTON JJA)
Rules 4.24 (Formal Offers to Settle), 4.29 (Costs Consequences of Formal Offer to Settle) and 14.59 (Formal Offers to Settle – Appeals)

This was a Decision regarding Costs following an unsuccessful Appeal by the Appellant, Impact Painting Ltd. The Respondent, Man-Shield (Alta) Construction Inc., made an offer of settlement to the Appellant pending the Appeal for the full amount of the Trial Judgment (the "Offer"). Essentially the Offer was to accept the amount awarded at Trial without Costs in exchange for the Appellant foregoing the Appeal.

The issue before the Panel was whether the Offer triggered the Costs consequences under Rule 4.29; namely an award of double Costs if a Formal Offer is bested at Trial. The consequences described in Rule 4.29 are the same regardless of whether a Formal Offer is tendered in advance of a Trial in accordance with Rule 4.24 or in advance of an Appeal in accordance with Rule 14.59.

The Appellant argued that the Offer was not valid under Rules 4.24 or 14.59. The Appellant argued the Offer was ambiguous because it did not specifically address both the Respondent's Statement of Claim and Counterclaim. Furthermore, the Appellant argued that the Offer had not been bested because the original award in the Trial Judgment included in the Offer was subsequently increased in a corrected Judgment to address a technical error.

The Panel rejected these arguments. There was no pending Appeal regarding the Counterclaim. Moreover, the difference between the amount awarded in the original Trial Judgment and the amount ultimately awarded in the corrected Judgment was less than what the Respondent would have been entitled to in Costs following its success on Appeal. Therefore, the Respondent had technically bested the value enclosed in the Offer.

The Panel awarded double Costs to the Respondent from the date of the Offer based on Column 1 of Schedule "C".

ABT ESTATE (RE) V COLD LAKE INDUSTRIAL PARK GP LTD, 2019 ABQB 131 (MILLAR J)
Rules 4.29 (Costs Consequences of Formal Offer to Settle), 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in making Costs Award)

The Court considered whether to award an enhanced Costs award following Judgment against multiple Defendants. In the Trial of the Action, multiple Defendants were found to have: given evidence that was not credible; sworn false Affidavit evidence; failed to answer Undertakings and/or gave misleading evidence during the Trial.

The Court noted that Costs are discretionary and guided by Rules 10.29, 10.31, and 10.33. The Court then stated that there were a number of factors present in this case that justified awarding enhanced Costs. Those factors included the fact that the case was lengthy and complex; there were adverse findings against the Defendants on credibility; there was late disclosure of documentation; there were failures to attend Questioning; and the Defendants refused a proposed Agreed Statement of Facts that was largely proven at Trial.

The Court then awarded double Costs against the Defendants held liable at Trial. The Court also found that double Costs were also appropriate because both the Formal Offer and Calderbank Offer made by the Plaintiffs were bested at Trial. Rule 4.29 provides that where a Formal Offer is made and bested at Trial, the offering party is entitled to double Costs.

ABB INC V THURBER, 2019 ABQB 289 (WOOLLEY J)
Rules 4.29 (Costs Consequences of Formal Offer to Settle), 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award), 10.33 (Court Considerations in Making Costs Award) and Schedule C

Two groups of the several Defendants were separately represented, and were wholly successful in defending the Plaintiff's claim. Each of the two Defendant groups requested enhanced Costs based on the litigation misconduct of the Plaintiff, as well as double Costs for steps taken after service of a Formal Offer.

The Court first acknowledged that Rule 10.29 entitles a successful party to Costs, subject to the Court's general discretion reserved under Rule 10.31, having regard to the factors set out in Rule 10.33. Justice Woolley noted that while reliance on Schedule C accomplishes the purposes of Costs awards, recent decisions have factored into Costs analyses the reality that Schedule C is grossly out of date.

In considering the Defendants' request for enhanced Costs, the Court observed that the Plaintiff's claim was meritless, and yet the Plaintiff was obstinate in the prosecution of its claim. This included a refusal to drop a significant, but clearly meritless, portion of the claim until after the start of Trial. The Defendants were awarded double Schedule C Costs at the appropriate column for the entire conduct of the litigation.

Straightforward application of Rule 4.29 directed that the Defendants received double Costs for all steps following their Formal Offers, which amounted to quadruple Costs at the appropriate column of Schedule C for steps taken subsequent to those Offers. These Costs were awarded to both groups of Defendants, as their interests were not necessarily aligned and the separate retainer of counsel was reasonable.

The Defendants' claim for Costs was not, however, wholly successful. Certain specific Costs were found to be unreasonably claimed, and as such, the Court either rejected them outright or rejected them provisionally, pending further support being provided to the satisfaction of an Assessment Officer. Given the mixed success of the Costs Application, the parties were to bear their own Costs of preparing submissions.

HORST TYSON DAHLEM PROFESSIONAL CORPORATION V JOHN F SCHNEIDER, 2019 ABQB 297 (JEFFREY J)
Rules 4.29 (Costs Consequences of Formal Offer to Settle), 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

This was a Decision on Costs following a Trial. The Trial involved an allegation that the Defendant had attempted to Judgment proof himself in respect of a separate debt

action (the "Debt Action") by fraudulently conveying his home from being held jointly with his wife, to being owned by the wife alone ("Fraud Action"). The Fraud Action was commenced against both husband and wife. The Plaintiff was successful in the Debt Action, but unsuccessful in the Fraud Action. Global settlement offers (which involved resolution terms for the Debt Action and a third related Action) had been provided and rejected by the Plaintiff, and the Defendants issued Formal Offers for the Plaintiff to discontinue the Fraud Action on a without Costs basis.

The Defendants sought solicitor-client Costs in the Fraud Action, while the Plaintiff asserted it should be entitled to Costs, and alternatively that a single set of Column 1 Costs were appropriate but only incremental to the Costs already awarded in the Debt Action.

Justice Jeffrey noted that Costs are "first and foremost subject to judicial discretion", and that the interpretation and application of the Rules respecting Costs (Rules 4.29, 10.29, 10.31, and 10.33) is to be done in a matter which does justice between the parties. Justice Jeffrey noted that solicitor-client Costs are exceptional, and only to be awarded where a party has conducted itself in a manner which is reprehensible, scandalous or outrageous. Justice Jeffrey held that such Costs are appropriate where a party has failed to prove fraud allegations at Trial with access to information sufficient to conclude that the other party was not fraudulent. Justice Jeffrey noted however, that even if a solicitor-client Costs award is appropriate, it is still subject to judicial discretion in the circumstances.

Justice Jeffrey denied the Plaintiff's claim for Costs of the Fraud Action, noting that the Plaintiff lost, that sufficient evidence had arisen after Questioning to conclude that the matter should not have proceeded to Trial, and that the global settlement offers provided by the Plaintiff were inappropriate as the third related Action was ongoing and that the results and interests for each of the Defendants could not be neatly extricated from each other or the ultimate result.

Justice Jeffrey found that the Defendants' interests were sufficiently independent that they required their own counsel and that separate Costs for each were appropriate. Jeffrey J. however, found that solicitor-client Costs were not appropriate in this Action as the evidence that the subject transaction was not fraudulent was not uncovered until late in the litigation process. Justice Jeffrey also noted that the Defendant husband had additional factors further militating against the appropriateness of a solicitor-client Costs award, which included: that all three Actions related to a valid debt against him which he had initially acknowledged yet failed to pay; his conduct delayed the litigation needlessly; he misled the Court; the allegation of fraud against him did not adversely affect him the same as the average Defendant.

Justice Jeffrey awarded the Defendant husband party-and-party Costs on Column 1 of Schedule C for the steps in which he used the services of counsel (excluding steps he took as a self-represented litigant), and granted double Costs pursuant to Rule 4.29 for all steps taken after the date he served the Formal Offer to discontinue the Fraud Action on a without Costs basis.

Justice Jeffrey awarded the Defendant wife enhanced Costs on Column 5 of Schedule C, and doubled those Costs for all steps taken after having served the Formal Offer to discontinue the Fraud Action on a without Costs basis.

Justice Jeffrey noted that the allegations against her were not substantiated and that they would have impaired her reputation, and that following Questioning, it was apparent to an objective reviewer that the claim against her would fail, but that she was "held hostage unnecessarily" in a "petty fight between her ex and his office subordinate". Justice Jeffrey also noted Plaintiff counsel's advocacy in respect of the Fraud Action which had "strayed too far".

Justice Jeffrey allowed the claims for experts pursuant to Rule 10.31(2)(d) as having been a reasonable cost incurred by a "prudent litigant" despite the fact that the evidence of the expert at Trial ended up being "of little assistance".

Justice Jeffrey directed, pursuant to Rule 10.31(4), that the Costs awarded to the Defendant husband be set off against the Costs and outstanding Judgment debt he was directed to pay in the Debt Action.

GEOPHYSICAL SERVICE INCORPORATED V FALKLAND OIL & GAS LIMITED, 2019 ABQB 314 (WOOLLEY J)
Rules 4.29 (Cost Consequences of Formal Offer to Settle), 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award), 10.33 (Court Considerations in Making Costs Award) and Schedule C

After the Plaintiff's claims against the Defendants were summarily dismissed, the Defendants sought their Costs based on a percentage of fees rather than Schedule C. The Defendants argued that the Plaintiff had engaged in misconduct, entitling them to enhanced Costs. They also argued that Schedule C is outdated, and that they should be entitled to 70% of their legal fees. Alternatively, if Schedule C were to be relied on, they argued it should be subject to a 45.60% adjustment to account for inflation.

The Defendants had also served a Formal Offer to Settle on the Plaintiff before their Statement of Defence was filed, permitting a discontinuance without Costs within 30 days, and a discontinuance with $5,000 in Costs if accepted after 30 days. The Formal Offer was not accepted, which the Defendants argued entitled them to double Costs after the date of the Offer in accordance with Rule 4.29.

Justice Woolley first explained that pursuant to Rule 10.29(1)(a), the successful party is generally entitled to their Costs. While Costs are discretionary, the factors listed at Rule 10.33 should be considered in determining the amount of Costs to award. Her Ladyship further noted that pursuant to Rule 4.29(3), if a Defendant makes a Formal Offer to Settle that is not accepted, that Defendant is entitled to double Costs for steps taken after the date of the Offer. However, the Offer must be genuine, and include an element of compromise.

Next, Justice Woolley explained that Costs may be enhanced where a party has "engaged in misconduct", as set out in Rule 10.33(2)(g), but simply losing an Action is not evidence of misconduct creating a presumption of enhanced Costs. Here, the Defendants had argued that the Plaintiff engaged in misconduct when they it a novel argument which was ultimately unsuccessful. Her Ladyship found that this did not constitute misconduct, and that "losing a case summarily does not necessarily demonstrate misconduct by the unsuccessful party". Her Ladyship also explained that, while it is sometimes appropriate to award Costs based on a percentage of legal fees incurred by a party, Schedule C is a useful tool for permitting parties to assess Costs risks in advance, and that arbitrariness "undermines the predictability … of law". Her Ladyship also noted that Judges are not well-positioned to analyze the reasonableness of incurred legal fees. Through Rule 10.33, Schedule C may be adjusted based on principle, rather than arbitrarily. That being said, Justice Woolley also noted that without adjusting for inflation, "Schedule C risks becoming merely an artifact" and will not truly indemnify parties or discourage meritless claims.

Justice Woolley held that the Defendants' Formal Offer to Settle was not a true compromise, and that it was not genuine because the matter was complex and the Offer was made before complex issues could be determined. However, Justice Woolley also concluded that Rule 10.33 warranted "some additional upward adjustment of the [Costs] claimed", including the fact that the claim was for $18 million and the Plaintiff had recovered nothing; the importance of the issues to the Defendants; and the complexity of the Action. As such, Her Ladyship ordered that the Defendants' Schedule C Costs be multiplied by 1.5.

CZ V RB, 2019 ABQB 367 (LABRENZ J)
Rules 4.29 (Costs Consequences of Formal Offer to Settle), 9.13 (Re-opening Case), 10.29 (General Rule for Payment of Litigation Costs) and 10.33 (Court Considerations in Making Costs Award)

This was a ruling on Costs following numerous proceedings regarding parenting time. The proceedings included an Application by CZ to reopen the Court's Decision to grant increased parenting time to RB pursuant to Rule 9.13. That Application was dismissed.

RB argued that he was entitled to Costs under Rule 10.29 because he was successful in obtaining increased parental time. Moreover, RB argued that he should be granted double Costs for a portion of the proceedings because a Formal Offer had been submitted pursuant to Rule 4.29.

The Formal Offer was not tabled within 10 days of a hearing as required by Rule 4.29(4)(c). RB argued, however, that the Court has discretion under Rule 4.29 to extend or shorten timelines so as to award double Costs.

CZ opposed RB's Application for Costs by highlighting Rule 10.33(2) which places Costs in the discretion of the Court following consideration of factors including whether a party has engaged in misconduct. CZ reminded the Court of numerous instances throughout the proceedings where RB misled the Court both in oral and written submissions.

Labrenz J. specifically noted that the discretion to refuse Costs for a party who has engaged in misconduct is expressly recognized under Rule 4.33(2). Labrenz J. then ruled that Costs were not appropriate in this case despite RB's success because he had committed "serious litigation misconduct." RB's Application for Costs was dismissed.

864503 ALBERTA INC V GENCO PLACE PROPERTIES LTD, 2019 ABCA 248 (BIELBY, VELDHUIS AND STREKAF JJA)
Rules 4.29 (Costs Consequences of Formal Offer to Settle), 10.31 (Court-Ordered Costs Award), 14.59 (Formal Offers to Settle) and 14.88 (Cost Awards)

Both parties sought directions from the Court of Appeal as to how the Costs of the underlying Appeal and the prior proceedings should be addressed. The underlying Appeal arose out of a dispute relating to termination of the business relationship between the Appellants, Genco Place Properties Ltd ("Genco"), and the Respondents, 864503 Alberta Inc ("864").

Genco submitted that the Costs awarded by the Master were final and sought to have the Court direct that the 3 times multiplier applied by the Master be carried forward to Costs incurred on the Appeals to the Chambers Judge and the Court of Appeal pursuant to Rule 14.88(3). Additionally, Genco sought double Costs from the date of the Formal Offer pursuant to Rule 14.59. 864 objected, arguing that the circumstances fell within Rule 4.29(4)(a) in that the Master awarded a lump sum award pursuant to Rule 10.31(1)(b) and accordingly the double Costs rule should not apply.

The Court of Appeal found that their reinstatement of the Master's Decision on Appeal was awarded the usual deference afforded to Costs decisions. Accordingly, the Court found that the Costs assessed by the Master were reasonable and they should not be revisited but that it was not appropriate to carry them forward for the entirety of the proceedings pursuant to Rule 14.88(3).

On the issue of double Costs, the Court found that Genco was entitled to double Costs in the Court of Queen's Bench from the date of the Formal Offer pursuant to Rule 4.29. The Court did not find that the same was true of the proceedings on Appeal. The Court noted that Rule 14.59 contemplates a doubling of Costs relating to an Appeal where "a formal offer to settle the appeal or any part of the appeal" is made. The Court found that no Formal Offer was made in relation to the Appeal itself. Citing *Humphreys v Trebilcock*, 2017 ABCA 232, the Court found that when no renewal of the Formal Offer is made on Appeal then there is no doubling of Costs under Rule 14.59.

422252 ALBERTA LTD V MESSENGER, 2019 ABQB 251 (LEMA J)
Rules 4.31 (Application to Deal with Delay) and 4.33 (Dismissal for Delay)

The Action, commenced in 2000, concerned tax consequences flowing from the alleged negligence of two law firms involved in a corporate transaction. Before a Master, the Action was dismissed for inordinate delay pursuant to Rule 4.31. On Appeal, Justice Lema was asked to consider the law firms' recent participation in the Action as implicit acquiescence to prior delay.

Justice Lema reviewed judicial interpretation of acquiescence as an exception to Rule 4.31. As a starting point, it was noted that Rule 4.31 does not expressly provide for an acquiescence exception, in contrast to the express acquiescence exception set out in companion Rule 4.33(2)(b). However, Justice Lema observed that the Court had previously exercised its discretion in applying Rule 4.31 (and predecessor Rule 244) to nonetheless recognize acquiescence as sufficient to defend dismissal. Under the current analytical approach to Rule 4.31, set out in

Humphreys v Trebilcock, 2017 ABCA 116, Justice Lema attributed consideration of acquiescence as relevant to step six, i.e. whether there is a compelling reason not to dismiss an Action.

Several judicial holdings regarding acquiescence to delay were usefully summarized by Justice Lema, including "acquiescence or waiver can be express or implicit"; "acquiescence or waiver requires more than silence or inactivity"; "context always matters" in ascertaining dismissal-barring participation; "waiver of a delay does not waive future delay"; and "the party considering further participation and wishing to preserve dismissal rights can do so by participating on a without-prejudice basis or by first applying for delay-based dismissal."

On the facts before the Court, the law firms' participation had been recent and substantial, including the negotiation of the terms of a Form 37. Justice Lema was prepared to consider inordinate delay subsequent to the law firms' participation in the Action, finding no second-stage delay. The Appeal was allowed and the Action permitted to proceed.

VORTEX HYDRO SERVICES INC V CLEAN HARBORS ENERGY, 2019 ABQB 305 (MAH J)
Rules 4.31 (Application to Deal with Delay), 4.33 (Dismissal for Long Delay) and 9.15 (Setting Aside, Varying and Discharging Judgments and Orders)

The Defendant sought to dismiss the Action for long delay. It had initially applied to dismiss the Action for delay under Rule 4.33, but later amended its Application to seek dismissal under Rule 4.31 instead.

The Plaintiff's claim was served in March, 2014. Although the parties had stayed in touch through counsel "at various points", no steps were taken in the litigation until the Defendant applied to dismiss the Action for delay in April, 2017. The next day, the Plaintiff noted the Defendant in default, and filed and served its Affidavit of Records. In April, 2017, a Master dismissed the Defendant's Application to dismiss for delay, and set aside the Plaintiff's Noting in Default pursuant to Rule 9.15. The parties agreed to appeal both Decisions to a Justice, and that Appeal was heard by Justice Mah in April, 2019.

Justice Mah reviewed the factors for determining whether delay has been inordinate from the Court of Appeal's decision in *Humphreys v Trebilcock*, 2017 ABCA 116. His Lordship found that the 3-year period between service of the Statement of Claim and the Noting in Default constituted an unreasonable and inordinate delay – but the delay was justified because negotiations had occurred during the first year of the litigation, and some of the delay was caused or contributed to by staffing issues and the Fort McMurray wildfire. His Lordship clarified that Rule 4.31 does not require that a "significant advance" occur to justify delay, as required by Rule 4.33; while the Action did not proceed as quickly as one would hope, both sides evidently acquiesced to the "languid pace of the litigation". As such, the Action was not dismissed pursuant to Rule 4.31.

Next, Justice Mah considered whether the Plaintiff's Noting in Default should be set aside. It had occurred after a number of extensions were given to the Defendant to file a Statement of Defence. In March, 2017, one last deadline was set and the Defendants' Statement of Defence was demanded within 20 days. Approximately 2 weeks later, the Defendants filed their Rule 4.33 Application, and the Plaintiff's counsel advised he would be noting the Defendants in default the next day. The Defendants did not file a Statement of Defence as they were concerned that doing so could constitute acquiescence to the delay for the purposes of Rule 4.33. Justice Mah held that this was an "explainable default": the Defendants initially understood that they were not required to file a Statement of Defence, and thereafter could not practically file a Statement of Defence before being noted in default. His Lordship also held that the Defendants had a meritorious defence, and that overall, the just and fair thing to do was to set aside the Noting in Default under Rule 9.15.

XPRESS LUBE & CAR WASH LTD V GILL, 2019 ABQB 326 (MASTER ROBERTSON)
Rules 4.31 (Application to Deal with Delay) and 4.33 (Dismissal for Long Delay)

Master Robertson considered two Applications to dismiss two actions (the "Actions") started in 2009 and 2010 for delay pursuant to Rules 4.31 and 4.33 (the "Applications"). The Actions had been subject to numerous delays including two that approached the three year limit contemplated under Rule 4.33. On the eve of a three year anniversary with no steps having been taken, the Plaintiffs served answers to Undertakings to extend the proceedings. Nearly three years after that when no further advances had been made, the Plaintiffs served a Notice to Attend for Questioning and a proposed litigation plan on the Defendants. The Defendants then brought these Applications, though it is notable that these Applications were filed before the three-year "drop dead" date, but they were scheduled to be heard after the drop-dead date had passed.

The issues before were the Court were whether the filing of the Applications actually saved the Actions from a Rule 4.33 given that they were filed prematurely, and if so, whether the Actions could still be dismissed pursuant to Rule 4.31 because the delay was "inordinate and inexcusable."

With regards to Rule 4.33, Master Robertson surveyed previous case law establishing that the passage of time is "frozen" once an Application for dismissal is filed. This is because no party should be expected to do anything further before a dismissal Application is heard and decided. Therefore, ironically, the Defendants' Applications for dismissal under Rule 4.33 actually saved the Actions under that Rule because they had the effect of stopping the passage of time and they were filed before three years had passed since the Actions were last advanced.

However, Master Robertson still assessed whether the Actions could be dismissed under Rule 4.31 which, in contrast to Rule 4.33, is discretionary in nature. Rule 4.31 allows the Court to dismiss an Action if delay has caused "significant prejudice." Significant prejudice is presumed where the delay has been "inordinate and inexcusable."

The delay in this case was obviously inordinate and inexcusable. Since 2012, there were two delays of nearly three years until the Plaintiffs did something clearly to avoid a mandatory dismissal. Moreover, the second delay would have exceeded three years but for the Defendants' premature filing of these Applications. Furthermore, there was some evidence of actual prejudice. Master Robertson noted that the Actions were not simply "documents" cases; they would require the testimony of witnesses. Three witnesses had died since the Actions were filed while others surely would have faded memories. This would clearly hamper cross-examination.

The Applications were both allowed and the Actions were dismissed pursuant to Rule 4.31.

OUELLETTE V REPCHUK, 2019 ABQB 329 (MASTER ROBERTSON)
Rules 4.31 (Application to Deal with Delay), 4.33 (Dismissal for Long Delay) and 10.22 (Action for Payment of Lawyer's Charges)

The Plaintiff, a former barrister and solicitor, commenced the underlying Action in 2014 to recover his unpaid legal fees, disbursements, and other charges (the "Action"). The Defendant/Applicant applied to dismiss the Action for delay under Rules 4.31 and 4.33.

Master Robertson noted that a lawyer who wants to recover his or her legal fees has two forms of action available: (1) the lawyer can sue as any other creditor can, or (2) the lawyer can have the accounts assessed by the assessment officer, formerly referred to as "taxation". The latter remedy is usually followed because it is cheaper, simpler, faster, and the assessment officer is well-equipped to consider the terms of the retainer, the work done, the fees charged, and the disbursements and other charges incurred.

Master Robertson emphasized that if a lawyer chooses the former option, to sue, Rule 10.22 provides that no Judgment is to be entered in default of defence without the

Court's permission, which sometimes means that the Action is then subsequently also referred to the assessment officer because Judges and Masters in Chambers are not well-equipped to review solicitors' accounts. Master Robertson highlighted that Rule 10.22 further says that no Order of Costs with respect to the Action (by Statement of Claim) is to be made unless the Court specifically orders so.

Notwithstanding the foregoing, the Plaintiff chose to sue his former client back 2014 and, as Master Robertson noted, had not done much more than getting through the pleadings stage of the Action. After reviewing the relevant jurisprudence, Master Robertson concluded that the Applicant had met the criteria under both Rules 4.33 and 4.31 and accordingly dismissed the Action.

PAUL V QUAN, 2019 ABQB 381 (MASTER SCHULZ)
Rule 4.31 (Application to Deal with Delay)

The Defendants, the Chief of Police and a number of police officers, applied to dismiss the Action for delay pursuant to Rule 4.31.

Master Schulz reviewed the test for delay under Rule 4.31, explaining that the six-part inquiry set out by the Court of Appeal in *Humphreys v Trebilcock*, 2017 ABCA 116 had since been simplified into a four-part test, in which the Court should ask: (1) What is the extent of the delay; (2) Is the delay inordinate and inexcusable; (3) Has the delay resulted in significant prejudice to the moving Defendants; and (4) Is there nonetheless a compelling reason not to dismiss the Action.

Master Schulz found that the delay in the Action was inordinate and inexcusable, as it had gone on for over ten years and the Plaintiff had not provided an excuse to justify the delay. The Master explained that pursuant to Rule 4.31(2), if delay is inordinate and inexcusable, it is presumed to have caused the Defendants significant prejudice and the onus shifts to the Plaintiff to disprove significant prejudice. In this respect, Master Schulz found that the Plaintiff had "narrowly rebutted the presumption of serious prejudice" because evidence had been preserved through audiovisual evidence, statements given in other disciplinary and criminal actions, and through the existence of transcript evidence. As such, there was no need to consider the fourth element of the test, and the Defendants' Application was dismissed.

MCKAY V ERIKSSON, 2019 ABQB 408 (MASTER PROWSE)
Rules 4.31 (Application to Deal with Delay) and 4.33 (Dismissal for Long Delay)

The Applicant/Defendant police officers applied to dismiss the Action filed by the Respondent/Plaintiff for injuries he allegedly suffered at the hands of the Applicants/Defendants in 2004. The Application for dismissal was made pursuant to Rule 4.31 which gives the Court discretion to dismiss an Action where delay has resulted in significant prejudice to the non-moving party, or where the delay has been "inordinate and inexcusable" resulting in a presumption that significant prejudice has been suffered.

Master Prowse applied the factors outlined in the leading case of *Humphreys v Trebilcock*, 2017 ABCA 116 for assessing an Application under Rule 4.31.

The delay in this case was inordinate. Master Prowse noted that, barring special circumstances, most cases should be in a position to be set for Trial within 3-5 years of being commenced. This case was now 15 years old and still required additional steps to be taken before Trial.

The delay was also inexcusable. The unexplained delays in this case amounted to approximately 7 1/2 years. Therefore, there was a presumption that the Applicants/Defendants had suffered significant prejudice. Master Prowse found that the Respondent/Plaintiff had not rebutted the presumption, and further, that the Applicants/Defendants had suffered actual prejudice as a result of the delays. Master Prowse rejected the Respondent/Plaintiff's submission that this was a "documents" case that would not require an emphasis on *viva voce* evidence. The first hand recollection of witnesses would be important, and as such, the Applicants'/Defendants' defence had undoubtedly been prejudiced following the passage of 15 years.

Finally, Master Prowse considered whether there were any overriding policy reasons to maintain the claim notwithstanding that prejudice had resulted from the delay. Master Prowse clarified that the moving party's participation following delay can be a reason to let an Action continue; however, if this were always the case, no Action would ever be dismissed for delay unless the mandatory Rule 4.33 was triggered after 3 or more years of delay. Rule 4.31 would be redundant. Master Prowse then confirmed that Rule 4.31 requires that the Plaintiff press ahead toward Trial without allowing a case to languish for years.

After 15 years of sporadic activity, this case was still not ready for Trial. The Applicants/Defendants were not responsible for this. Master Prowse granted the Application and dismissed the Action.

STABILIZED WATER OF CANADA INC V BETTER BUSINESS BUREAU OF SOUTHERN ALBERTA, 2019 ABCA 146 (WATSON, VELDHUIS AND HUGHES JJA)
Rule 4.31 (Application to Deal with Delay)

The Appellant appealed the Order of a Chambers Judge which had dismissed an Appeal of a Master's Order to strike the Action pursuant to Rule 4.31 for inordinate delay. The Action related to events which had occurred between the spring of 2000 and October of 2002. The Respondent had requested certain disclosure from the Appellants in December of 2014 and maintained that they would not question the Appellants' representatives without receiving the disclosure. The Appellants did not provide the requested disclosure and no further steps were taken in the litigation until the Respondent applied to strike the claim for long delay in February of 2016.

The Master had found that the Appellants had a duty, and the means under the Rules, to continue the Action moving forward, and that they failed to do so. The Master held that the delay was inordinate and inexcusable. The Master also found that the Respondent had suffered serious prejudice as nearly all of the individuals connected to the events in question were "gone or deceased". The Chambers Judge concurred with the Master's conclusions.

The Court of Appeal held that the Appeal was subject to a deferential standard of review, and that neither the Master nor the Chambers Judge had made any palpable and overriding error, and that there was no evidence on the record which excused the delay. The Appeal was dismissed.

ARBEAU V SCHULZ, 2019 ABCA 204 (STREKAF, KHULLAR AND FEEHAN JJA)
Rules 4.31 (Application to Deal with Delay) and 4.33 (Dismissal for Long Delay)

This was an Appeal of a Chambers Judge's Decision which dismissed an Application by the Appellant, Schulz, to dismiss this Action commenced by the Respondent, Arbeau, for delay pursuant to Rules 4.31 and Rule 4.33.

The Panel first addressed Rule 4.33, noting that the Rule requires the Court to dismiss an Action if three or more years have passed without a "significant advance." An exception can be made where a moving party has continued to participate in an Action to such an extent that the Court determines it should continue. The Panel also confirmed that a "significant advance" has to be evaluated in context; the focus should be on substance over form.

The Chambers Judge dismissed Schulz's dismissal Application on the basis that Schulz's provision of Undertaking responses was a "significant advance" and also that Schulz's response to a Notice to Disclose showed his further participation in the Action such that it should continue.

The Panel found no reviewable error in these findings by the lower Court and therefore dismissed the Appeal in regards to Rule 4.33.

However, the Panel found that additional consideration was necessary with regards to Rule 4.31. Rule 4.31 gives the Court discretion to dismiss an Action where delay has resulted in "significant prejudice." Furthermore, significant prejudice is presumed where the delay is shown to be "inordinate and inexcusable," thereby placing the onus on the non-moving party to rebut the presumption.

In this case, the Chambers Judge ruled that the Court did not need to assess whether the delay in this case was "inordinate and inexcusable" because Schulz had not shown significant prejudice. As the Panel noted, that is not the proper analysis. The Court is to assess the delay first and then determine whether there is a presumption of significant prejudice because the delay has been inordinate and inexcusable, or, whether there is actual evidence of significance prejudice where the delay has not been inordinate and inexcusable.

The Panel then conducted its own assessment of the Rule 4.31. The Court concluded that, despite the lower Court's error in applying the Rule, the Appeal should still be dismissed. Though there had been delay in this case, it had not been "inordinate." Significant progress had been made towards Trial despite periodic delays. Moreover, there was no evidence of actual significant prejudice suffered by Schulz. The Appeal was dismissed.

NAMMO V CANADA (JUSTICE AND ATTORNEY GENERAL), 2019 ABQB 300 (MASTER ROBERTSON)
Rules 4.33 (Dismissal for Long Delay) and 9.4 (Signing Judgments and Orders)

TD Meloche Monnex Insurance Company ("TD Meloche") was one of the few remaining Defendants in the underlying Action, which the Plaintiff ("Mr. Nammo") commenced in 2014. TD Meloche applied to have the Action struck on various grounds including: (1) delay under rule 4.33; (2) that the Action was commenced out of time pursuant to the *Limitations Act*, RSA 2000 c. L-12; and (3) that the Action be dismissed because it was commenced as a collateral attack on previous proceedings that Mr. Nammo had brought before the Alberta Law Enforcement Review Board (the "ALERB").

In addressing the issue of delay, Master Robertson found that the apparent last step in this Action was a request by Mr. Nammo sent to the former Chief Justice for a jury Trial in June of 2016 (the "Jury Trial Letter"). In reviewing the history of the file, Master Robertson noted that the (former) Chief Justice responded to the Jury Trial Letter in August of 2016, denying the request. Unfortunately, in reviewing the Court file the (former) Chief Justice had made an error believing that the Action had been dismissed as against all Defendants including TD Meloche, which grounded his Lordship's decision to reject the Jury Trial Letter. Master Robertson further noted that TD Meloche was never advised of the Jury Trial Letter and described two possible ways of dealing with its provision in response to the dismissal for long delay Application brought under Rule 4.33: (1) the Court could view the correspondence as an administrative error which, at best, could be described as "institutional delay" as discussed in *Ma v Kwan*, 2019 ABQB 89. If so, that time could be taken into account for purposes of Rule 4.33 and could be considered to have "stopped" pending resolution; or (2) the request itself for a jury Trial, not resolved, might also be said not to have significantly advanced the Action.

Master Robertson noted analogous jurisprudence and found that if the Application for a jury Trial had been brought as a formal Application to be heard in Chambers, the filing and service of it would not have advanced the Action. Master Robertson emphasized that case law has held that simply filing and serving an Application, but not having it actually heard, does not significantly advance an Action nor does it actually advance the Action at all.

Master Robertson concluded that Mr. Nammo's letter written to the Chief Justice, not even copied to other parties, could not have a more powerful effect on the advance of the Action than a formal Application would have. Accordingly, Master Robertson, finding that no actions had been taken to advance the Action within the last three years, dismissed the Action pursuant to Rule 4.33 with Costs. Master Robertson invoked Rule 9.4, allowing TD Meloche to prepare the Order without the approval of Mr. Nammo as to its form.

BENIWAL V KAHLON, 2019 ABQB 411 (MASTER ROBERTSON)
Rule 4.33 (Dismissal for Long Delay)

The Applicant (Defendant) applied to dismiss the Action due to long delay pursuant to Rule 4.33. The issue in dispute between the parties was whether the Action

was significantly advanced by the provision of replies to certain Undertakings which were given just short of three years after initial replies to Undertakings provided. Initial Undertaking responses were provided in October of 2015. Upon receipt of the initial Undertaking responses, the Applicant's counsel advised the Respondent's counsel that the Undertakings were not complete. In August of 2018, Respondent's counsel provided further responses to the Undertakings.

The Applicant argued that the further Undertaking responses did not significantly advance the Action because they either did not provide any new information, or the information which was provided was of marginal relevance or utility to the resolution of the dispute. The Respondent argued that the significant advance in the Action which occurred by the provision of the further Undertakings was the provision of the information that the special damages being sought were limited to the items which had been previously provided.

Master Robertson held that while the information provided in August 2018 was given "long after it should have been" and was "modest", it nonetheless significantly advanced the claim for the purposes of Rule 4.33. However, Master Robertson reserved the jurisdiction to "impose a firm litigation schedule" pursuant to Rule 4.33(2) to ensure the matter proceeded to Trial expediently. Master Robertson also declined to award Costs to the Respondent despite his success in the Application. The Application was dismissed.

BOLAND V CAREW, 2019 ABCA 202 (BIELBY, O'FERRALL AND STREKAF JJA)
Rule 4.33 (Dismissal for Long Delay)

The Appellant appealed an Order of a Chambers Justice would have dismissed his Application to have the Action dismissed for long delay pursuant to Rule 4.33. The Action related to claims for divorce and division of matrimonial property. The Appellant's Rule 4.33 Application was brought after the Respondent applied for child support payments retroactive to the parties' separation in December 2009. The Action had been commenced in February 2010, and the parties reached an agreement in late 2010 - early 2011 which resolved some but not all of the claims in the Action. No formal steps had been taken in the Action since the parties came to that agreement, but the Appellant made child support payments as contemplated in the agreement until July 2017, when he unilaterally reduced the support payments being made.

The Chambers Judge found that the Appellant had participated in the Action and otherwise acquiesced in the delay. The Chambers Judge also noted that there is no limitation period for when an Action for divorce or support must be made, such that even if the current Action were dismissed, there would be nothing prohibiting the Respondent from commencing a new Action for divorce and support payments, such that the dismissal would only result in delay and wasted Costs. The Chambers Judge dismissed the Application.

The Court of Appeal found that the entering into and abiding by the terms of the settlement agreement constituted a step which significantly advanced the Action, as it resolved the child support issue and saved the parties the time and expense of seeking Court intervention on that issue. The Panel noted that Rule 4.33(2) should not be applied in a manner which discouraged parties from attempting to settle aspects of their ongoing disputes for fear that the ongoing claims could be prejudiced. The Court of Appeal also concurred with the Chambers Judge's assessment that dismissing the Action would be of no ultimate utility in any event as the Respondent is not barred by limitations to re-commence another Action. The Appeal was dismissed.

CASE V CANACCORD GENUITY CORP, 2019 ABQB 257 (MASTER SCHULZ)
Rules 5.1 (Purpose of this Part), 5.2 (When Something is Relevant and Material) and 5.25 (Appropriate Questions and Objections)

In the underlying Action, Stanley Case, his spouse, children and grandchildren (in trust) (the "Plaintiffs") brought an Action for losses allegedly incurred with respect to the overall decrease in value to their Canaccord Genuity Corp. (the "Defendant") investment portfolios

(the "Case Accounts"). The Plaintiffs alleged that Stanley had communicated a change in investment objectives from "High Risk" to "Low Risk" but that the Defendant did not appropriately monitor or administer the accounts accordingly. In the Application before Master Schulz, the Plaintiffs had objected to various questions and Undertakings requested by the Defendant at Questioning on the basis of relevance, materiality or spousal privilege (the "Application").

Master Schulz reviewed the Rules for Part 5 Questioning including the purpose of Part 5 under Rule 5.1 and that, pursuant to Rule 5.25, parties are not required to answer any questions that are not relevant and material, or those questions that are properly objected to on the basis of privilege, including spousal privilege. Master Schulz went onto review Rule 5.2 as to what information is to be deemed relevant and material. Citing the seminal jurisprudence on point, Master Schulz noted that relevance is primarily determined by the pleadings, whereas materiality relates to whether the information can help, directly or indirectly, to prove a fact in issue. Master Schulz further emphasized that the Questioning process is confined to eliciting facts of primary relevance and secondary relevance wherein primary relevance attaches to facts directly in issue, while secondary relevance attaches to facts from which the existence of primary facts may be directly inferred. In light of the foregoing, Master Schulz reviewed and ruled upon each of the specific refusals.

Master Schulz then turned to the issue of objections grounded in spousal immunity. Counsel for the Plaintiffs had objected to various questions posed to Maryann Case regarding what Stanley may have told her about the accounts. Master Schulz explained that the *Alberta Evidence Act*, RSA 2000, c A-18 generally abolishes the spousal immunity rule in civil proceedings in Alberta and creates a "spousal privilege" that protects communications from being forcibly disclosed. This Rule is subject to the exception that a Justice, under the discovery principles of Rule 5.1 may, in some cases, require spousal privilege to give way to the need for disclosure of relevant communications.

Master Schulz determined that the communications between Stanley Case and Maryann fell within this exception and accordingly granted the order compelling the related questions to be answered.

DILLMAN V BC PENSION CORPORATION, 2019 ABQB 395 (DUNLOP J)
Rule 5.2 (When Something is Relevant and Material)

The Plaintiff applied to compel answers to questions which the Defendant refused to answer. Justice Dunlop noted that the Defendant was only required to answer questions to which the answer would meet the test for relevance and materiality as set out in Rule 5.2(1). Justice Dunlop noted that questions which did not meet the test under Rule 5.2(1) included questions of law, opinion, or which were hypothetical, and questions which were argument in substance, or which seek argument in reply. Justice Dunlop required answers to questions which would elucidate a relevant response, and which did not fall within the category of excluded questions set out above.

The Court applied Rule 5.2 to each of the questions that the Plaintiff sought the Defendant to answer. Dunlop J. allowed some of the questions, and disallowed a number of other questions.

STATT V SGI CANADA INSURANCE SERVICES LTD, 2019 ABQB 170 (KIRKER J)
Rules 5.11 (Order for Record to be Produced) and 6.14 (Appeal from a Master's Judgment or Order)

The Applicants, Mr. and Mrs. Stratt ("the Stratts"), appealed a Master's Decision dismissing their Application for an Order compelling responses to Undertakings taken under advisement. The Master ruled that the records that the Respondent, SGI Canada Insurance Services ("SGI"), refused to produce were subject to litigation privilege. The issue on Appeal was whether the Master had erred and whether the documents should be produced.

Kirker J. confirmed that Rule 6.14(3) states that an Appeal of a Master's Decision is an Appeal on the record but that additional evidence may be considered where it is relevant

and material in the opinion of the Judge. Moreover, Kirker J. stated that Rule 5.11(1)(b) allows the Court to order a document to be produced if the Court is satisfied that privilege has been improperly claimed over the document.

The Court ruled that, with one exception, the subject documents had been created for the dominant purpose of litigation and were therefore privileged. Moreover, Kirker J. rejected the Stratts' argument that the privilege expired after the conclusion of a Dispute Resolution Process ("DRP") that the parties engaged in. Her Ladyship stated that the positions of the parties and the issues in dispute were still essentially the same notwithstanding the conclusion of the DRP, and they were now engaged in live litigation. Therefore, the privilege endured.

Kirker J. ordered SGI to produce some recorded phone conversations between SGI and the Stratts as these were not created for the dominant purpose of litigation. However, the Appeal of the Master's Decision was dismissed in all other respects.

1218388 ALBERTA LTD V REIFEL COOKE GROUP LIMITED, 2019 ABQB 471 (GROSSE J)
Rules 5.18 (Persons Providing Services to Corporation) and 10.28 (Definition of "Party")

A Master had granted the Plaintiff permission to question representatives of the Defendant's environmental consultant, pursuant to Rule 5.18. The Defendant and the environmental consultant were successful in having that Decision overturned on Appeal. Both the Defendant and the environmental consultant sought Costs.

The Plaintiff defended the suggestion of multiple Costs awards by arguing that the Defendant and the environmental consultant took the same position on Appeal, and the environmental consultant filed limited materials. Notwithstanding this collaboration, the Court held that separate retainer of legal counsel had been reasonable given that the interests of the Defendant and the environmental consultant were not necessarily aligned. Justice Grosse granted Costs in favour of both the Defendant and the environmental consultant.

The Plaintiff argued in the alternative that the environmental consultant was a non-party, and therefore its Costs should be limited to Column 1 of Schedule C. Justice Grosse disagreed, noting the expansive definition of "party" in Rule 10.28 which includes all persons participating in an Application. The Court applied Column 5 of Schedule C, as was otherwise applicable.

PEPPLER ESTATE V LEE, 2019 ABQB 144 (TOPOLNISKI J)
Rules 5.31 (Use of Transcript and Answers to Written Questions) and 8.14 (Unavailable or Unwilling Witness)

In a tragic series of events, Douglas Peppler ("Mr. Peppler"), died at the age of forty-one, five years after becoming quadriplegic due to severe cervical myelopathy. The Action was about whether a family physician ("Dr. Lee"), who saw Mr. Peppler twice, some four months before his quadriplegia, was negligent and caused his injuries, and was thereby legally responsible for those injuries. The Plaintiff was Raymond Peppler, Mr. Peppler's father and the executor of his son's estate (the "Estate").

Two evidentiary issues arose pertaining to the Rules including: (1) the use of evidence from unavailable witnesses under Rule 8.14; and (2) the use of transcripts from one's own Questioning pursuant to Rule 5.31.

The Estate sought to introduce a partly redacted transcript of Mr. Peppler's Questioning. Topolniski J. analyzed Rule 8.14 pertaining to unavailable witnesses and concluded that the proposed evidence satisfied the requirements of Rule 8.14. Justice Topolniski noted that Mr. Peppler's evidence was given under oath, he was skillfully questioned by Dr. Lee's counsel, and while Mr. Peppler's credibility could not be further probed by cross-examination, that did not weigh against admitting the evidence. Citing Renke J. in *DD v Wong*, 2018 ABQB 486, Her Ladyship observed that a want of cross-examination on credibility may be compensated for by judicial self-instruction and in weighing the evidence.

Dr. Lee also sought to read-in several passages of his Questioning transcript pursuant to Rule 5.31(1) for context. The Estate objected arguing that these proposed read-ins

were distinct answers and unnecessary to provide context. Reviewing the relevant authorities Topolniski J. found that Rule 5.31 cannot be used to put before the Court all that the witness has said on a particular topic; but rather, is limited to adding the rest of a specific answer or clarifying a passage which has been taken out of context or may be misleading. Accordingly, Her Ladyship admitted most of read-ins but disallowed the admission of two proposed read-ins for the above reasoning.

SUPERIOR ENERGIES INSULATION GROUP CANADA INC V ALUMA SYSTEMS INC, 2019 ABQB 166 (KIRKER J)
Rules 6.14 (Appeal from Master's Judgment or Order) and 7.3 (Summary Dismissal)

The Plaintiff commenced an Action alleging that the Defendants had breached a contract by failing to pay for services, and seeking payment for unpaid invoices. One of the Defendants filed a Counterclaim alleging that it was the Plaintiff who breached the contract, resulting in damages. When the Plaintiff applied to summarily dismiss the Counterclaim in Master's Chambers, the Master held that the Counterclaim could not be determined summarily. The Plaintiff appealed.

Justice Kirker first noted that pursuant to Rule 6.14(3), an Appeal from a Master's Order is an Appeal on the record, but additional evidence may be heard if the Appeal Judge considers it to be relevant and material. Her Ladyship also noted that an Appeal from a Master's Order is heard *de novo*, on a correctness standard.

Justice Kirker then explained that an Action may be summarily dismissed pursuant to Rule 7.3(1)(b) where there is "no merit to a claim or part of it". It is appropriate where there is no genuine issue requiring a Trial, meaning that the Court is able to make a fair and just determination of the merits of the claim on the motion record.

Her Ladyship then noted that the parties had been given the chance to provide additional submissions since the Court of Appeal's five-member panel Decision in *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49, was released. That Decision emphasized a "shift in culture" such that Trial should not necessarily be the Court's default procedure where it is fair and just to determine a claim summarily. This will be the case where the Judge is able to "make the necessary findings of fact and apply the law … unless there is a substantive reason to conclude that summary disposition would not 'achieve a just result'".

Justice Kirker held that in this case, the Plaintiff asked the Court to make a number of factual findings which could not be established on a balance of probabilities. Factual uncertainty remained which required "a more complete picture than the information in the motion record offers" to be clarified. As such, the matter was not appropriate for summary determination and the Appeal was dismissed.

STIRLING V ENCANA CORPORATION, 2019 ABQB 182 (BENSLER J)
Rule 6.14 (Appeal from Master's Judgment or Order)

In 2006, the Respondent ("Ms. Stirling") slipped and fell on ice and snow accumulated on the sidewalk outside of the Appellants' premises (the "Incident"). At that time, the City of Calgary owned the sidewalk and Encana Corporation was the owner the building adjacent to the sidewalk (the "Premises") which was being leased by Calhome Properties Ltd, (collectively, the "Appellants"). The Premises were demolished shortly after the Incident. The original Statement of Claim referred to the sidewalk but did not mention an awning that extended over the sidewalk. The Amended Statement of Claim included an allegation that the Appellants failed to inspect and maintain the awning and that snow and ice was allowed to form on the sidewalk from water flowing from the awning to the sidewalk (collectively, the "Amendments").

After reviewing the *Limitations Act*, RSA 2000, c L-12, Master Farrington found that the facts remained generally the same as in the original claim and that the question of where the water originated from was always going to be an issue. As such, Master Farrington allowed the Amendments. On Appeal, Justice Bensler noted that the standard of review for an Appeal from a Master is correctness, and no deference is owed to the Master's Decision. Bensler J. also

addressed the preliminary issue as to whether the new evidence adduced by the parties should be admitted. The Appellants opposed the new evidence submitted by Ms. Stirling which consisted of, amongst other things, video footage and photographs taken by Ms. Stirling.

Justice Bensler considered Rule 6.14(3) which grants the Court authority to admit new evidence if it is deemed relevant and material. Her Ladyship found that the new evidence related to the location where Ms. Stirling fell and the potential issues of water drainage. It also showed the sidewalk area where the awning structure would have been located and the fact that there may have been a downspout. While this did not mean that the situation was exactly the same as it was at the time of the Incident, it was still relevant and material and accordingly admissible.

Turning to the issue of the Amendments, the Appellants argued that the Master erred by failing to consider the principles enumerated in jurisprudence which provides for four exceptions to allowing Amendments, including whether there is prejudice not compensable in Costs. The Appellants argued that they were prejudiced by the late Amendments due to the passage of time.

Bensler J. found that that the origin of the ice was always going to be an issue in the Action. The fact that it was not investigated on an earlier occasion by the Appellants could not mean that the Appellants should be immune from liability. While there was no question that the burden remained on Ms. Stirling to prove her case at Trial, this was not a case where the Appellants could not defend their case, especially considering the photographs and video evidence. Accordingly, the Appeal was dismissed.

STEER V CHICAGO TITLE INSURANCE COMPANY, 2019 ABQB 318 (HOLLINS J)
Rules 6.14 (Appeal from Master's Judgment or Order) and 7.3 (Summary Judgment)

The Appellants purchased a duplex in Calgary which was found to contain numerous construction defects, prompting them to seek compensation from their title insurer (the "Insurer") to cover losses arising from repair work. They then applied for Summary Judgment against the Insurer pursuant to Rule 7.3. After their Application for Summary Judgment was dismissed in Master's Chambers, the Appellants appealed that Decision to a Justice; and the Insurer cross-applied for Summary Dismissal of the claims against it.

Justice Hollins first noted that an Appeal from a Master to a Justice is has been described as an Appeal *de novo*, despite the fact Rule 6.14(3) describes such an Appeal as being "on the record". Her Ladyship noted that the notion that Appeals from a Master to a Justice are *de novo* appears to stem from comments made by Cote, J.A. in *Bahcheli v Yorkton Securities*, 2012 ABCA 166, regarding the standard of review, and commented that the words used by Cote J.A. do not actually suggest that "an appeal from the Master to our Court is automatically an appeal *de novo* but rather that the low threshold for the introduction of new evidence on appeal dooms the true "appeal on the record" to be the exception rather than the rule". Her Ladyship emphasized that Appeals from Masters are not true *de novo* Appeals, and that there would be no reason to discuss the standard of review if they were.

Next, Justice Hollins noted that the test for Summary Judgment is not whether a legal issue can be determined beyond a doubt, but whether it may be fairly decided on the record before the Court. Since the matter was one of contractual interpretation, and there were no disputed material facts or issues of credibility, Summary Judgment was a proper method for resolving the dispute. After reviewing the insurance policy at issue, Her Ladyship determined that the losses arising from the construction defects did not fall under any policy provisions pertaining to risks affecting title. As such, the Appeal was dismissed, and the Insurer's Application for Summary Dismissal was granted.

SIMMIE V JRJ CONCRETE LTD, 2019 ABQB 409 (FRIESEN J)
Rules 6.14 (Appeal from Master's Judgment or Order) and 7.3 (Summary Judgment)

The Applicants, Eleanor Simmie ("Ms. Simmie") and Ja-Neen Janela ("Ja-Neen"), initially sought Summary Judgment in accordance with Rule 7.3 on a debt claim (the

"Application"). The Applicants claimed they loaned money to the Respondent, JRJ Concrete Ltd. ("JRJ Concrete" or "the company"), at the request of the President of the company, Carlos Janela ("Carlos") (collectively, the "Respondents"). At the time the loans were made, Carlos was married to Ja-Neen and Ms. Simmie was his mother-in-law. The only condition of the loan was future repayment in full, with interest.

In defending the Application, the Respondents argued that the Applicants did not loan money to JRJ Concrete, but rather, to Carlos personally, and therefore, the company was not responsible for repayment of the debt. Carlos was not made a Third Party to the Action by either the Applicants or the Respondent. The Master in Chambers denied the Application finding that relevant credibility issues arising primarily from the evidence of Carlos and other representatives of JRJ Concrete on the issue of knowledge as to the parties to the loans could not be resolved on the record before him.

Justice Friesen noted the applicable jurisprudence and Rule 6.14 for the proposition that, in practical terms, an Appeal from a Master's Decision is akin to, if not actually, a *de novo* hearing given that Rule allows for additional or new evidence to be put before the Chambers Judge hearing the Appeal.

Friesen J. noted that the documentary evidence in the case clearly corroborated the evidence of Ja-Neen and Ms. Simmie that they loaned money to JRJ Concrete at Carlos' request. Justice Friesen found that Her Ladyship was able to make the necessary findings of fact on the evidence before the Court and that *viva voce* evidence was not required to resolve the dispute. Justice Friesen concluded that the Applicants had met their burden of illustrating that there was no defence or genuine issue requiring a Trial, granted the Appeal, and granted Summary Judgment to the Plaintiffs.

CANADA (ATTORNEY GENERAL) V BOUZ, 2019 ABQB 422 (INGLIS J)
Rules 6.14 (Appeal from a Master's Judgment or Order) and 13.18 (Types of Affidavit)

The Appellant, Canada (Attorney General), appealed a Master's Decision granting Summary Judgment against the Respondent, Rouz, in regards to unpaid student loans. The Master awarded the principle amount owing from the loans (which dated back to 2009) but only awarded interest from 2015 forward. The Appellant argued that interest should applied to the entire period of arrears.

The Court confirmed the standard of review for an Appeal of a Master's Decision is correctness and Rule 6.14 permits fresh evidence on Appeal as long as it is relevant and material.

The Court also commented on the veracity of Affidavit evidence that is required when an Application is for final relief. There had been some concern that the Affidavit evidence initially tendered by the Appellant was hearsay and not based on first-hand knowledge, which is required by Rule 13.18(3) when the Application is for final relief. The Court noted that recent jurisprudence has held that there is some flexibility in the Rule, especially when the party tendering evidence is a large organization. An affiant is permitted to obtain the required knowledge by reviewing documents.

The Appeal was allowed. The Court ruled that the Master should not have granted the Respondent relief from interest payments. Doing so interfered with the operation of a statute which was too broad an application of the Court's power to grant relief from forfeiture. The Appeal was allowed.

JWS V CJS (AKA CJH), 2019 ABCA 153 (MARTIN, SCHUTZ AND HUGHES JJA)
Rules 6.40 (Appointment of Court Expert), 6.41 (Instructions or Questions to Court Expert), 6.42 (Application to Question Court Expert) and 6.43 (Costs of Court Expert)

The Appellant father (the "Father"), appealed a Trial Decision awarding primary care of three of his children to the Respondent, their mother (the "Mother"). The issues on Appeal included the Trial Judge's reliance on an expert report that had not been tested under cross-examination.

During the Trial proceedings, the Trial Judge determined that the only expert evidence at His Lordship's disposal was a report drafted by an expert who had not interviewed the parties' children since 2013. Therefore, the Trial Judge exercised the Court's powers under Part 6 of the Rules to obtain resources to assist the Court. Another expert would be appointed pursuant to Rule 6.40 which allows the Court to appoint an independent expert, and pursuant to Rule 6.41 which allows the Court to give the expert instructions.

The Panel also noted Rule 6.42, which gives the Court discretion to allow a Court-appointed expert to be cross-examined if an Application is made within twenty days of a party receiving the expert's report, and also Rule 6.43 which states that the parties shall share the costs of the expert unless the Court orders otherwise.

A Consent Order was signed by the parties appointing an expert (the "Expert") to assist the Court, and the Court ordered that the costs of the Expert would be paid 80% by the Father and 20% by the Mother. The Expert then provided a report, albeit without an accompanying Affidavit as required under Rule 6.41(3)(a).

Months later, as the Trial Judge was considering a Judgment in the matter, the Father's counsel wrote to the Trial Judge inquiring whether His Lordship would consider hearing additional evidence including with respect to the Expert's report. After the Court asked for clarification on what issues would be raised, the Father's counsel confirmed the Father had no issue with the Expert's report going into evidence but was concerned that it hadn't been tested. The Trial Judge proceeded to render a Judgment awarding primary care of the children to the Mother without allowing cross-examination of the Expert, which resulted in this Appeal.

The Panel found no issue with the Trial Judge's handling of the case. There is no right of cross-examination of a Court-appointed expert; it is within the discretion of the Court following an Application. No Application had been brought by the Father. Moreover, Rule 6.41(3) provides that a Rule 6.40 report is admissible in evidence. Finally, the Expert's failure to submit her report under Affidavit as required by the Rules was immaterial. Neither party challenged the report's authenticity or admissibility, nor was there any evidence that the lack of an Affidavit prejudiced either party.

The Appeal was dismissed with Costs awarded to the Mother.

GEOPHYSICAL SERVICE INCORPORATED V FALKLAND OIL AND GAS LIMITED, 2019 ABQB 162 (WOOLLEY J)
Rule 7.3 (Summary Judgment)

The Defendants applied for Summary Dismissal of the entirety of the Plaintiff's claim which related to alleged breaches of seismic data license agreements ("License Agreements"). The substantive issues related to whether the Defendants' disclosure of some of the information obtained pursuant to the License Agreements to third parties constituted a breach of those License Agreements, and whether any of the claims were barred by limitations.

Justice Woolley canvassed the relevant principles for Applications under Rule 7.3 set out in *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49, and summarized the relevant analysis on this Application to be whether: i) the Defendants established that the record makes it possible to resolve the issues in dispute on a summary basis; ii) the Defendants have demonstrated that the facts proven on a balance of probabilities disclose that there is no merit to the Plaintiff's claim; iii) if the Defendants establish the first two burdens, then whether the Plaintiff has shown a genuine issue requiring Trial "based on the nature of the issue or its merits"; and iv) whether the state of the record provided

confidence for the Court to exercise its discretion to summarily dismiss some or all of the Plaintiff's claims.

Justice Woolley found that the substantive issues in dispute related to contractual interpretation and the application of limitations legislation, which are issues well suited to summary consideration. With respect to each of the alleged contractual breaches, Justice Woolley held that the Defendants had established that the Plaintiff's claims had no merit as either being permissible behaviour under the License Agreements or the claims being statute barred. Justice Woolley found that the Plaintiff did not provide any basis to establish a triable issue, noting that bare allegations did not suffice.

The Application for Summary Dismissal was granted.

WAGE V CANADIAN DIRECT INSURANCE INCORPORATED, 2019 ABQB 303 (INGLIS J)
Rule 7.3 (Summary Judgment)

The Defendant appealed the Order of a Master which had dismissed the Defendant's Application for Summary Dismissal. The Action related to whether the Defendant insurer was liable under the Plaintiff's automobile insurance policy to the Plaintiff's estate and family for an accident which occurred in the Philippines, not Canada. The Defendant's only stated defence to the Action was that the policy did not apply to accidents which occurred in the Philippines.

Justice Inglis confirmed that the Master's Decision was reviewable for correctness, and that the relevant question was whether there was no merit to the Plaintiffs' claim. Justice Inglis considered the wording of the insurance policy and applied their plain and grammatical meaning to find that the policy did apply to the relevant accident which occurred in the Philippines. As such, Justice Inglis found that there was merit to the Plaintiffs' claim and dismissed the Application for Summary Dismissal.

STANKOVIC V 1536679 ALBERTA LTD, 2019 ABCA 187 (O'FERRALL, SCHUTZ AND STREKAF JJA)
Rule 7.3 (Summary Judgment)

The Appellant, 1536679 Alberta Ltd, ("153 Ltd") appealed the Decision of a Chambers Judge granting Summary Judgment in a foreclosure Action in favour of the Respondent, Stankovic.

The Panel began by stating that the Court must consider whether the record before the Chambers Judge allowed the Chambers Judge to make the necessary findings of fact and apply the law. And if so, whether there was any substantive reason why the Summary Judgment process should not be used. The Panel clarified that there is no "symmetry of burdens" in a Summary Judgment Application: a Plaintiff/Applicant seeking Summary Judgment needs to establish that there no defence to its claim in order to show that there is no genuine issue for Trial. However, a Defendant/Respondent resisting Summary Judgment need only prove that the Applicant has not met its burden of showing there is no genuine issue for Trial.

In this case, the Chambers Judge granted partial Summary Judgment by finding that a mortgage was in default. However, the Chambers Judge also found that there were triable issues in regards to 153 Ltd.'s Counterclaim. The Panel ruled that this was an error. The issues in the Statement of Claim on the mortgage and those underlying the Counterclaim were sufficiently connected that it was not possible that one claim entailed triable issues while the other did not.

Therefore, the Panel ruled that the Decision of the Chambers Judge did not "comport with 'overall considerations of fairness and the ability 'to achieve a just result.'" The Appeal was allowed and the Chambers Judge's Decision was set aside.

CUSTOM METAL INSTALLATION LTD V WINSPIA WINDOWS (CANADA) INC, 2019 ABQB 345 (MASTER ROBERTSON)
Rule 9.15 (Setting Aside, Varying and Discharging Judgments and Orders)

An Application was brought by the Defendant by Counterclaim to modify a Consent Order pursuant to Rule 9.15(4)(c). The Consent Order had required the Defendant by Counterclaim to attend for Questioning on certain dates, failing which the Defence to Counterclaim would be struck. The Defendant by Counterclaim did not attend for Questioning as required.

Master Robertson reviewed the history of the dispute, and noted a dismissive and contemptuous attitude on the part of the Defendant by Counterclaim. In fact, the Defendant by Counterclaim had repeatedly infringed previous Court Orders, leading to the striking of its Statement of Claim. Consistent with that past conduct, it was not until after the Consent Order had been breached that the within Application was made to vary it.

In support of its position, the Defendant by Counterclaim asserted mistake in the course of previous counsel's negotiation of the Consent Order. The Court found that the terms of the Consent Order were clear and understood by both parties, albeit noting some evidence that former counsel for the Defendant by Counterclaim had taken a cavalier approach in setting down certain Questioning dates with the expectation of later amendment. This cavalier approach was cited by the Defendant by Counterclaim in requesting that the Court decline to hold it to account for the conduct of counsel. The Court ruled that the Defendant by Counterclaim was sufficiently aware and involved in the circumstances that it should be bound in accordance with ordinary principles of agency without further inquiry by the Court. The Application was dismissed and the Defence to Counterclaim was struck.

KRAUSHAR V KRAUSHAR, 2019 ABCA 186 (SLATTER, BIELBY AND WAKELING JJA)
Rule 9.15 (Setting Aside, Varying and Discharging Judgments and Orders)

A husband appealed a Chambers Judge's Decision to set aside his wife's Noting in Default in an Action for divorce and division of matrimonial property, and the resulting Judgment granting him an interest in a home registered in the names of his wife and her parents.

The Court of Appeal explained that Rule 9.15 governs the setting aside of Orders and Judgments, and that Rule 9.15(3)(a) and (b) in particular govern the setting aside of a Noting in Default or granting of Default Judgment. Pursuant to the Rule, either may be set aside where: (a) there is a non-trivial flaw in the process leading to the Default Judgment; or (b) where the procedure leading up to the Noting in Default was normal, but where the Defendant has an arguable defence, did not intend to allow the Judgment to go by default, has a reasonable excuse for the default, and promptly applied to set aside the Noting in Default when they became aware of it. The Court of Appeal also explained that, in addition to the factors to be considered in accordance with Rule 9.15(3)(a) and (b), the Court retains residual discretion to set aside the Noting in Default or Default Judgment where fairness requires it.

The Court considered each factor and determined that the Chambers Judge did not commit a palpable and overriding error in setting aside the Noting in Default and Judgment. However, the Court noted (as the Chambers Judge had) that the wife had a "dismal history of delay" and had attempted to avoid the litigation in the hopes that it would go away. As such, the parties were ordered to bear their own Costs of the Appeal.

BLAKE, CASSELS & GRAYDON LLP V BAKER HUGHES CANADA COMPANY, 2019 ABQB 233 (DILTS J)
Rules 10.9 (Reasonableness of Retainer Agreements and Charges Subject to Review), 10.10 (Time Limitation on Reviewing Retainer Agreements and Charges) and 13.5 (Variation of Time Periods)

The Respondent had retained the Applicant law firm to represent it in a complex and fast-paced lawsuit, pursuant to a retainer agreement (the "Retainer"). The terms of the Retainer included that legal fees would be charged based on time incurred, and that accounts would be paid in a timely manner as a condition for continued legal service.

The Applicant issued 23 accounts to the Respondent over a period of approximately 1.5 years, all of which were paid. The Respondent later appointed new counsel and entered into without prejudice discussions with the Applicant taking issue with certain of its accounts. When those discussions ended, the Respondent applied to extend the 6-month time limit imposed by Rule 10.10(2) to review 15 of the Applicant's accounts.

Justice Dilts first noted that pursuant to Rules 10.9 and 10.10, the reasonableness of a lawyer's account may be reviewed by a Review Officer within 6 months from the date the account was issued. While Rule 10.10(2) creates a time limit for such a review, it is not a limitation period and may be extended by the Court pursuant to Rule 13.5(2). Her Ladyship explained that the right of review promotes public confidence in the administration of justice, but the time limit ensures that requests for review are made promptly and that finality may be expected after a reasonable period of time. The review process allows for disputes to be resolved efficiently, encourages clients to raise concerns quickly, and allows lawyers to assess whether a receivable will or will not be collected in a timely manner.

Justice Dilts explained that the decision to extend the 6 month deadline pursuant to Rule 13.5(2) is discretionary. The Court should consider the policy and principles underlying the Rule along with the interests of justice, and may consider a non-exhaustive list of factors in doing so, including the extent of the delay, prejudice, whether there is evidence of over-charging, the relationship between the lawyer and client, the first intent to tax, and whether there was agreement to any amount. These factors may be inter-related and should be weighed together.

In this case, Justice Dilts found that the Respondent had put the Applicant on notice that it had concerns about legal fees early on, even though it waited to initiate a formal review process. However, the Respondent was a sophisticated client and had provided no reason for the delay. The potential prejudice from the delay included inconvenience to the Applicant, but that prejudice was not quantifiable or inordinate. Her Ladyship also noted that the Applicant's fees were significantly higher than the estimate that it had provided, and held that the Respondent's payment of disputed fees during the litigation should not be held against it. Further, Her Ladyship noted that despite the Applicant being a "sophisticated law firm with a robust accounting system", its accounts were not transparent or consistent, which weighed in favour of extending time for review. As such, Justice Dilts extended the time limit imposed by Rule 10.10(2) for the accounts to be reviewed.

JLL V JLC, 2019 ABQB 278 (GROSSE J)
Rules 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

The parties each sought Costs arising from two unsuccessful Appeals of Orders of the Provincial Court. The Appeal of the Order of Judge Mah pertained to access to a child during Christmas holidays, which access time had passed by the time the Appeal was heard. The Appeal was dismissed as being moot. The Appellant sought Costs on this Appeal, arguing that the Appeal was necessary because the Order was likely to be relied upon by the Respondents for future access Orders. The Appellant also noted that the Respondents conduct resulted in several unnecessary steps which the Appellant incurred legal Costs in addressing. The Appellant also argued that no Costs should be payable in respect of the second Appeal because the Provincial Court Judge had amended the Order without notice to either party, and that the Appeal of that Order took relatively less

time before the Court. The Appellant also argued that the photocopying charges claimed for were excessive.

Justice Grosse noted that Costs are awarded at the discretion of the Court, per Rule 10.31, however, subject to that discretion, the general rule is that the successful party is entitled to Costs, per Rule 10.29. In exercising its discretion on Costs, Rule 10.33 sets out a number of considerations for the Court.

Justice Grosse held that each party should bear its own Costs for the Appeal of Judge Mah's Order. Justice Grosse noted that the Respondents had not argued mootness and wanted the Order upheld on its merits, however, the circumstances did not warrant granting the Appellant Costs for bringing a moot Appeal.

Justice Grosse granted the Respondents Costs for the second Appeal, noting that there was no reason to depart from the general rule for payment of litigation Costs set out in Rule 10.29. Justice Grosse elected to fix a set amount of Costs pursuant to Rule 10.31.

Justice Grosse held that each party would bear their own Costs of the Application before her given the mixed success.

SCHUNN V PUGH, 2019 ABQB 302 (YUNGWIRTH J)
Rules 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

The Court was asked to consider the Costs consequences of two Applications advanced to resolve an unexpected tax liability arising out of a retroactive spousal support award made at Trial. In summary fashion, the Court observed that "Costs are always in the discretion of the Court. Rule 10.29 [...] sets out the general rule that a successful party is entitled to a costs award against the unsuccessful party. This is subject to the Court's general discretion under Rule 10.31, which brings into consideration, the matters described in Rule 10.33." The Court applied the general rule in awarding party-party Costs to the Defendant in the Action, being the successful party.

INTACT INSURANCE COMPANY V CLAUSON COLD & COOLER LTD, 2019 ABQB 225 (DILTS J)
Rule 10.30 (When Costs Award May Be Made), 10.31 (Court-Ordered Costs Award), 10.33 (Court Considerations in Making Costs Award) and Schedule C

The issue before the Master and on Appeal in the underlying Action was whether Intact Insurance Company ("Intact") owed Clauson Cold & Cooler Ltd. ("Clauson") a duty to defend it in two separate Actions. Clauson was successful both before the Master and on Appeal before Justice Dilts who found that Intact's duty to defend Clauson was triggered under the policy language and by virtue of the pleadings. The parties were invited to provide written submissions on Costs.

Clauson sought a Cost award of $30,000.00, approximately one half of its actual legal fees. Clauson relied on the Alberta Court of Appeal decision of *Hill v Hill*, 2014 ABCA 313 in support of the principle that its actual legal bills were a relevant factor in assessing an appropriate award of Costs and that party-party Costs are designed to compensate a party for approximately one half or slightly less of a reasonable legal bill. Intact argued that the law regarding Cost awards for non-monetary relief has evolved to create a division between claims involving complex matters and misconduct by a party, and those cases where there is no misconduct and the litigation is not overly complex. In the latter case, a multiplier of Schedule C is considered to be appropriate.

Justice Dilts noted that Rule 10.31 extends the Court a general discretion to make an award of Costs, taking into consideration the factors that appear in Rule 10.33. Those factors include the importance of the issues, the complexity of the Action and the conduct (including the misconduct) of the parties. After reviewing the relevant jurisprudence, Dilts J. emphasized that there are no hard and fast rules on Costs and the Court is left with a broad discretion to determine an award of Costs that is fair and reasonable in the context of the litigation.

Justice Dilts concluded that awarding Costs of Schedule C or on a multiplier of Schedule C would not provide Clauson

with an appropriate level of Costs given the nature of the issues in dispute, the risks to Clauson, and the effort required by the parties in bringing the Applications relative to the allowance in Schedule C. Accordingly, Clauson was awarded 40% of its actual solicitor-and-own-client Costs relating to the proceedings.

NORTHERN AIR CHARTER (P.R.) INC V ALBERTA HEALTH SERVICES, 2019 ABQB 333 (TILLEMAN J)
Rules 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

The Plaintiff, Northern Air Charter (P.R.) Inc. ("Northern Air"), unsuccessfully sought an injunction to be allowed to continue its air business relative to a government request for air services proposal (the "Application"). The overall commercial value of the Application approximated one billion dollars. The Defendants, Alberta Health Services ("AHS") and Can-West Corporate Air Charters Ltd. ("Can-West"), sought elevated party and party Costs for successfully responding to the Application.

Tilleman J. reviewed Rules 10.31 and 10.33 and noted that it is well-settled law that Trial Judges have a wide discretion to order Costs and that this discretion extends to awarding "any amount that the Court considers to be appropriate in the circumstances, including … an indemnity to a party for that party's lawyer's charges". Justice Tilleman highlighted that a Trial Judge's discretion must be exercised judicially and in accordance with established principles which includes the enumerated considerations in Rule 10.33.

Tilleman J. reviewed the relevant jurisprudence and, after considering Rules 10.31 and 10.33, concluded that: 1) AHS and Can-West were fully successful, 2) the issues argued were on the billion dollar end of public importance, and 3) the actions and motions within the Application were complex. Accordingly, Justice Tilleman found that AHS and Can-West be awarded Costs on an enhanced basis, as claimed, which amounted to roughly half of what full-indemnity Costs would have been.

R&R CONSILIUM INC V TALBOT, 2019 ABQB 275 (CAMPBELL J)
Rule 10.33 (Court Considerations in Making Costs Award) and Schedule C

The Court was asked to consider the Costs consequences of a vigorously contested Action to remove the trustees of a trust. The Applicants were ultimately successful in securing removal of the trustees, and as such, the Court was prepared to award Costs to the Applicant. The core of the Court's analysis concerned the magnitude of Costs that were appropriate in the case, having regard to the non-exhaustive considerations set out in Rule 10.33.

Campbell J. declined to award Costs on a solicitor and own client basis. While the Respondents had advanced some unreasonable positions, and committed some defensive misconduct, Campbell J. was not satisfied that the circumstances were of the "rare and exceptional" nature necessary to award Costs on a solicitor and own client basis.

The Court then considered Costs on a party-party basis. The Respondents asserted that as declaratory relief, rather than monetary relief, was sought, Section 1(4) of Schedule C directed that Costs be based on Column 1. However, the Court determined that the complexity of the matter was sufficient reason to consider "the value of the assets sought to be controlled or interfered with" as the basis for assessing the appropriate column, and Column 5 was approved as the baseline. Having regard to the unreasonable positions and defensive misconduct of the Respondents, the Court ordered double Column 5 Costs. In light of the considerable actual legal fees incurred by the Applicants, Campbell J. further ordered that a 40% increase in Costs was necessary to account for inflation.

Lastly, Campbell J. ordered that the fees paid by the Applicants for an expert witness were recoverable against the Respondent because the retainer of the expert, and the fees charged, were reasonable.

SVEDERUS V ENGI, 2019 ABCA 155 (MARTIN, SCHUTZ AND CRIGHTON JJA)
Rules 9.4 (Signing Judgments and Orders), 10.50 (Costs Imposed on Lawyer) and 14.2 (Application of General Rules)

The father (the "Appellant") appealed two Decisions of two separate Chambers Judges that resulted in a change being made in what was purported, by the Appellant, to an agreed shared parenting arrangement.

Absent an Affidavit from the Appellant, the initial Chambers Judge had granted an interim without prejudice temporary order in favor of the mother (the "Respondent"). The Chambers Judge also provided some temporary weekend access for the Appellant in the intervening period. The Chambers Judge, on request, also agreed to invoke Rule 9.4(2)(c), directing that prior approval of the Respondent's form of Order was not required by the self-represented Appellant. The Respondent's counsel prepared a form of Order which was signed by the clerk of the Court and filed (the "Langston Order").

The second Chambers Judge, relying on the Langston Order and on Family Law Practice Note 2B(8)(b), which precludes the Court from making substantial changes to a parenting arrangement in morning Chambers, concluded that the terms of the Langston Order could not be changed and that directed primary residential care should be with the Respondent.

The Court of Appeal noted that the second Chambers Judge did not have the benefit of the transcript that led to the Langston Order. At the outset, the Court of Appeal emphasized that when counsel asks the Court to invoke Rule 9.4(2)(c), counsel assumes the obligation to draft the Order fairly and accurately. This obligation is significant because parties and Judges must be able to rely on the Order's accuracy. The Court of Appeal noted that this Appeal illustrated the importance of counsel's obligation and of the consequences that inevitably follow when counsel fails to fulfill that obligation.

The Court of Appeal found that, on the record before the Court, not only did counsel not fulfill the obligation to draft the Langston Order fairly and accurately, but counsel's omissions from the Langston Order led the second Chambers Judge to err when relying on the Langston Order and on the Respondent's counsel's submissions about it. The Court of Appeal concluded that, had the Langston Order been properly reflected in the Order given, the second Chambers Judge would have appreciated that he was simply being asked to consider the same, earlier adjourned issue and would likely have come to a different conclusion. Accordingly, the Court of Appeal allowed the Appeal and set aside both Orders.

Turning to the issue of Costs, the Court of Appeal found that the conduct of Respondent's counsel warranted an enhanced Cost award payable by counsel personally. As such, the Court directed counsel for the Respondent to pay Costs of $2,000 (double Column 1 of Schedule C for attending to argue an Appeal).

FORT HILLS ENERGY LP V JOTUN A/S, 2019 ABQB 237 (MASTER PROWSE)
Rule 11.25 (Real and Substantial Connection)

During the development and operation of an open pit sands mine located in Alberta, the Plaintiff/Respondent, Fort Hills Energy LP ("Fort Hills"), made a decision to coat the structural steel used with a fire protection coating which had started to crack and fall off the structural steel. It was repaired at significant cost and Fort Hills commenced the underlying Action to recover damages.

Two of the Defendants, Jotun A/S ("Jotun Norway"), a Norwegian corporation, and Chokwang Jotun Ltd. ("Jotun Korea"), a Korean corporation, (collectively, the "Applicants") applied for an Order striking the Action on the basis that the Court does not have jurisdiction *simpliciter* over them. The Applicants argued, in the alternative, that if the Court did have jurisdiction *simpliciter* regarding the dispute that the Action should be stayed on the basis that Korea is the *forum conveniens*. Finally, the Applicants sought an Order setting aside the Order for service *ex juris* obtained *ex parte* against them on the basis of lack of full disclosure.

Master Prowse reviewed the relevant jurisprudence and noted that Fort Hills had the burden of identifying a presumptive connecting factor that links the subject matter of the litigation to Alberta and, where established, the Applicants had the burden of rebutting the presumption of jurisdiction. Therefore, it was only necessary for Fort Hills to establish one tort within Alberta for each of the two Applicants. Master Prowse found that Fort Hills was successful in establishing that the Courts of Alberta had jurisdiction.

In dealing with the factors with the issue of *forum non coveniens* Master Prowse noted that the factor which strongly favoured Korea was the compellability of witnesses and records while the factor which strongly favoured Alberta was juridical advantage. As such, Master Prowse found that the Applicants had not established that Korea was a clearly more appropriate forum, which is the test to be applied.

Finally, in dealing with the *service ex juris* Order obtained *ex parte* as against the Applicants, Master Prowse found that the Order was obtained by Fort Hills in accordance with Rule 11.25. Master Prowse concluded that the Affidavit used to apply for service *ex juris* on behalf of Fort Hills met the requisite standard of establishing a 'good arguable case' that there was a real and substantial connection between Alberta, the Applicants, and the nature of the tort alleged. Accordingly, Master Prowse declined to set aside the Order for service *ex juris*.

GOLDEN TRIANGLE CONSTRUCTION MANAGEMENT INC V NUWEST INTERIOR SYSTEMS INC, 2019 ABQB 292 (MASTER PROWSE)
Rule 13.5 (Variation of Time Periods)

In this Application, Master Prowse was asked to determine whether the Court should strike two builders' lien actions (the "Actions") that were filed within the requisite 180 days but were defective, and alternatively, whether the Court has jurisdiction to allow the lienholder to amend the defective Actions *nunc pro tunc*.

The lienholder had filed Actions to enforce two builders' liens within 180 days; however, the Actions were defective in that they did not name the general contractor as a Defendant.

Master Prowse allowed the lienholder to amend the Statements of Claim in the Actions to include the general contractor. The 180 day time limit for filing the Actions was triggered in this case by a Court Order and not by the *Builders Lien Act*, RSA 2000, c B-9. Further, Rule 13.5(2) gave the Court discretion to extend a time period specified in an Order.

OLSON-LIPINSKI V LIPINSKI, 2019 ABCA 120 (MCDONALD, WAKELING AND FEEHAN JJA)
Rule 14.5 (Appeals Only with Permission)

At first instance, the Plaintiff was awarded child support arrears in the sum of $4,540. The Plaintiff appealed, arguing that the arrears award should have included RESP entitlements and total $24,073. However, the Plaintiff had not applied for permission to Appeal, contrary to Rule 14.5(1)(g) which requires permission for "any decision in a matter where the controversy in the appeal can be estimated in money and does not exceed the sum of $25,000 exclusive of costs."

As the parties were prepared to argue the Appeal, the Court heard submissions prior to deciding whether to grant permission to Appeal notwithstanding the lack of a prior Application. The Respondent argued that the allocation of RESP monies had not yet been determined by Application to the Court of Queen's Bench. The Court agreed. As such, the Court found that this was not the proper case to allow a belated Application to seek permission to Appeal, and dismissed the Appeal for lack of jurisdiction.

STANFIELD V LOW, 2019 ABCA 219 (ANTONIO JA)
Rule 14.5 (Appeals with Permission)

The Applicant, Stanfield, applied for permission to Appeal a ruling by Antonio J.A. preventing Stanfield from using a certain lawyer, Mr. Moodie, as his counsel.

Rule 14.5 requires an Application for permission to Appeal a ruling by a single Appellate Justice to be heard by that

same Appellate Justice. As Antonio J.A. noted, the key question for the Justice to determine is whether there are good reasons for a full panel to hear the Appeal, and this will be the case where: the Appeal raises issues of general importance; there is a reviewable and material issue of law worthy of panel review; or where the decision on Appeal rests on a palpable and overriding error and the order is worthy of panel review.

The Applicant did not argue any of these factors in the Application and there was no evidence that any of them applied. The Application was dismissed with Costs.

932282 ALBERTA LTD V ROYAL BANK OF CANADA, 2019 ABCA 252 (GRECKOL JA)
Rules 14.16 (Filing the Appeal Record – Standard Appeals), 14.47 (Application to Restore an Appeal), 14.64 (Failure to Meet Deadlines) and 14.65 (Restoring Appeals)

The Appellant applied under Rule 14.47 to restore its Appeal which was struck under Rule 14.64 for failing to file the Appeal record within the four month timeline prescribed by Rule 14.16. The Appellant did not file its Application to restore the Appeal until five months after having discovered its Appeal had been struck. The hearing of its Application was then adjourned for a further month, resulting in the Appeal being deemed abandoned for not having been restored within six months of being struck pursuant to Rule 14.65.

Justice Greckol noted that there are five factors to consider when deciding whether an Appeal should be restored: 1) arguable merit; 2) explanation for the delay causing the Appeal to be struck; 3) reasonable promptness in moving to restore the Appeal; 4) unwavering intention to proceed with the Appeal; and 5) potential prejudice to the Respondents. Justice Greckol noted that all factors must be assessed together to determine whether restoring the Appeal is in the interest of justice. Justice Greckol also noted that exceptional circumstances are required to restore an Appeal which has been deemed abandoned – a higher threshold than for restoring appeals which were only struck.

Justice Greckol found that the Appellant failed to demonstrate that its Appeal had arguable merit, as it failed to provide any law or evidence to support its grounds for Appeal. Greckol J. A. did find that the Appellant's explanation for the delay causing the Appeal to be struck was reasonable, as it was due to a mistaken belief that the transcripts had been ordered. Justice Greckol found that the Appellant moved promptly to order the transcripts once the mistake was discovered, however, waited five months after being notified that the Appeal had been struck to file the Application to restore the Appeal.

Justice Greckol noted that the Appellant did not demonstrate an unwavering intention to proceed with the Appeal, as no Affidavit was provided confirming an unwavering intention to proceed, and the Appellant had only ordered the transcripts and requested the Respondents' consent to restore the Appeal over the course of several months. Further, the Appellant knowingly adjourned the Application to restore the Appeal to a date where the Appeal would be deemed abandoned.

In considering prejudice to the Respondents, Justice Greckol found that the Respondents were entitled to consider the proceedings against them to be final as eleven months had passed from the date of the Order under Appeal. Given the casual manner the Appellant pursued the Appeal, Justice Greckol held it would not be in the interest of justice to restore it.

The Application to restore the Appeal was dismissed.

ABT ESTATE V COLD LAKE INDUSTRIAL PARK GP LTD, 2019 ABCA 145 (SLATTER, O'FERRALL AND WAKELING JJA)
Rule 14.88 (Cost Awards) and Schedule C

The Plaintiffs sought to recover damages for a failed investment. Three of the Defendants entered into a Pierringer settlement with the Plaintiffs, and the Action against them was accordingly dismissed on the first day of Trial. Certain other Defendants were ultimately found liable at Trial, two of whom subsequently paid the Judgment owed by them. The remaining liable Defendants filed Appeals. Two of the Appeals were dismissed, and one was successful.

Upon Application for a ruling on the Cost consequences of the three Appeals, the Court first noted the presumption in Rule 14.88 that a successful party is entitled to Costs of an Appeal. As against the unsuccessful Appellants, the Plaintiffs were entitled to Costs of the Appeals. The Court noted that generally the scale of Costs on Appeal is the same scale of Costs as applied at Trial; however, in this case, the Plaintiffs had received settlement amounts and Judgment payments from some of the Defendants, which reduced the quantum in dispute on Appeal, and lowered the appropriate Schedule C column.

The successful Appellant was awarded Costs of the Appeal against the Plaintiff. Moreover, the Costs award following Trial was set aside as against the successful Appellant, and instead Costs of Trial were ordered payable to the successful Appellant by the Plaintiff. The Court moderated this Costs award noting that the Appellant, albeit successful, was sufficiently involved in the failed investment that participation in the Plaintiff's Action was inevitable.

The successful Appellant had submitted two settlement offers in the course of litigation. In reviewing the effect of those two settlement offers, the Court found that the earlier offer had been unreasonable, and declined to recognize an impact on Costs. However, the second, more reasonable settlement proposal did move the Court to award double Costs for actions taken subsequent to that offer.

JOHANNSON V HAARANEN, 2019 ABCA 197 (ROWBOTHAM, O'FERRALL AND STREKAF JJA)
Rule 14.88 (Cost Awards)

The Appeal of an Order for retroactive and ongoing child support had been dismissed, though with a small variance to the Order as conceded by the Respondent. Both the Appellant and the Respondent sought to depart from Rule 14.88 regarding the entitlement of the successful party to Costs pursuant to Schedule C at the same scale as the Order appealed from. The Appellant requested reduced Costs on the basis that he had been partially successful. The Respondent requested enhanced Costs on the basis that the Appeal had been without merit.

The Court reviewed a well-settled interpretation of Rule 14.88, being that a "successful party" need only achieve substantial success, as opposed to complete success. The Court found no reason to deviate from Rule 14.88, implying that Respondent would be entitled to Costs as the substantially successful party, though only on the scale of Schedule C which applied to the Order appealed from.

LOTOSKI V LOTOSKI, 2019 ABCA 262 (ROWBOTHAM, O'FERRALL AND GRECKOL JJA)
Rule 14.88 (Cost Awards)

The Respondent, "Ms. Lotoski", was successful in the underlying Appeal and sought solicitor-client Costs in the amount of $25,268.72 or, in the alternative, enhanced Costs based on Column 5 of Schedule C of the Rules or, in the further alternative, specified Costs in the amount of $20,000.00. Ms. Lotoski also requested that the $20,000.00 posted by the Appellant, "Mr. Lotoski", as Security for Costs for the Appeal be released as payment for the Costs of the Appeal and his outstanding Court Costs (the "Security"). Mr. Lotoski submitted that each party should bear their own Costs or, alternatively, that he pay Costs in accordance with Column 1 or Column 2.

The Court noted that by default, the successful party is entitled to the Costs of the Appeal in accordance with Rule 14.88(1). The Court found that, per Rule 14.88(3), unless otherwise ordered, it is presumed that the scale of Costs in an Appeal shall be the same as the scale that applies to the Order or Judgment appealed from. The Court emphasized that this presumption, however, can be displaced when warranted by the circumstances.

Ms. Lotoski submitted that Mr. Lotoski engaged in blameworthy conduct by bringing all manner of Applications, failing to provide financial disclosures, ignoring Court Orders, commencing Appeals which did not proceed, and attempting to avoid his child support obligations throughout the proceedings. She contended that despite Mr. Lotoski's obligation to pay child support, he forced Ms. Lotoski to engage in unrelenting litigation for more than six years to recover these payments. Accordingly, she submitted that Mr. Lotoski's failure to pay child support

constituted reprehensible behaviour, which should attract an award of solicitor-client Costs.

The Court found that, though these circumstances did not merit the sanction of solicitor-client Costs (which are virtually unheard of except when provided for by contract), they did justify an award of enhanced Costs. Accordingly, the Court increased the Costs of the Appeal to Column 3 of Schedule C and directed that the amount posted for Security first be paid out to Ms. Lotoski for the Costs of the Appeal, the underlying Application, and any outstanding Costs before the balance be returned to Mr. Lotoski.

DL POLLOCK PROFESSIONAL CORPORATION V BLICHARZ, 2019 ABCA 203 (VELDHUIS, STREKAF AND HUGHES JJA)
Rule 14.92 (Authority of the Registrar)

The Respondent, a law firm, represented the Appellant in a personal injury matter, and later obtained a substantial award against the Appellant for unpaid legal fees and disbursements, and had attempted to enforce the award. The Appellant opposed the Respondent's enforcement efforts, and after several unmeritorious Appeals were launched, the Court of Appeal imposed filing restrictions on the Appellant.

This particular Appeal was brought forward by the Case Management Officer as one that could be summarily determined by a Panel, pursuant to Rule 14.92(e). The Court reviewed the background facts and held that it was moot and had no merit. As such, the Court summarily dismissed the Appeal pursuant to Rule 14.92(e), and also affirmed the filing restrictions that had previously been imposed.